89-1415

No. 89-___

Supreme Court, U.S.
FILED
MAR 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES E. LINDSEY, ROBERT E. FRIAR, AND DAVID STEWART,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RAYMOND J. LAJEUNESSE, JR.*
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
**Counsel of Record*

March 1990

16 pp

QUESTIONS PRESENTED

1. Do the procedural safeguards required by the first and fourteenth amendments to the United States Constitution for the exaction of compulsory union fees from nonunion public employees include an independent auditor's verification of the union's allocation of chargeable expenses, to reduce the risk that the fee will exceed what is constitutionally chargeable and to enable nonmembers to decide intelligently whether a challenge to the amount is worth pursuing?

2. Are nonmembers given an opportunity to challenge the amount of the fee before an *impartial* decisionmaker, as constitutionally required under *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), where:

   - nonmembers have no input in selection of the decisionmaker or the private association unilaterally chosen by the union to name the decisionmaker;
   - representatives of unions (including the union in question), but not of nonmembers, participate in governing the association,
   - arbitrators in the pool from which the decisionmaker is selected must be recommended and regularly employed by unions to arbitrate their disputes with management,
   - attorneys for unions (including the union in question), but not for nonmembers, assisted in designing the special rules for determining challenges, *and*
   - those rules neither require disclosure to nonmembers of circumstances that create an appearance of bias nor empower them peremptorily to disqualify a decisionmaker on such grounds?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below were:

Petitioners: All petitioners are named in the caption. James P. Lehnert, Elmer S. Junker, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman were plaintiffs in the proceedings in the district court through 1987. However, they have no standing with regard to the collection procedures at issue here, because they have not been employed in the relevant bargaining unit since before those procedures became effective, and defendant unions agreed not to collect service fees for earlier periods in a partial settlement of the case.

Respondents: Michigan Education Association; National Education Association of the United States; the Board of Control of Ferris State College; Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, members of the Board of Control of Ferris State College, in their official capacities; Robert L. Ewigleben, President of Ferris State College, in his official capacity; S. Eugene Bychinsky, Vice President, Personnel, of Ferris State College, in his official capacity.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW . . ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. IN NOT REQUIRING READILY AVAILABLE PROCEDURAL SAFEGUARDS THAT WOULD MORE CAREFULLY MINIMIZE THE INFRINGEMENT ON NON-UNION EMPLOYEES' FIRST-AMENDMENT RIGHTS, THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT 8

TABLE OF CONTENTS - CONTINUED

Page

A. An Independent Audit of the the Union's Calculation of Chargeable Costs Is Readily Obtainable and Provides More Assurance That the Fee Exacted Will Not Be Excessive Than Mere Verification That Expenditures Were Made and That the Arithmetic Is Correct 9

B. Mutual Selection or Appointment by a Governmental Agency Are Readily Available, and Fairer, Alternatives to Selection of the "Impartial Decisionmaker" by a Private Organization of the Union's Unilateral Choice and Over Which It Has Influence 14

C. This Court's Decisions in *Ellis* and *Hudson* Hold That A Service Fee Collection Procedure Is Inadequate If There Are Readily Available Alternatives Which Provide Greater Protection for the Rights of Nonmembers 18

TABLE OF CONTENTS - CONTINUED

Page

II. THE DECISIONS OF THE LOWER COURTS ARE IN CONFLICT AS TO THE NATURE OF THE INDEPENDENT VERIFICATION REQUIRED BY *HUDSON*, AS COUNSEL FOR THE UNIONS HAS CONCEDED 20

III. BOTH QUESTIONS PRESENTED BY THIS CASE SHOULD BE SETTLED BY THIS COURT, BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF DUE PROCESS IN PROTECTING FIRST-AMENDMENT FREEDOMS 22

CONCLUSION 23

APPENDICES

A. Opinion of the United States Court of Appeals for the Sixth Circuit (Dec. 12, 1989) 1a

B. Opinion and Judgment Order (W.D. Mich. Aug. 25, 1986) 5a

C. Opinion (W.D. Mich. Aug. 22, 1988) ... 68a

D. Opinion (W.D. Mich. Dec. 9, 1988) 86a

E. Opinion (W.D. Mich. Jan. 3, 1989, as corrected Feb. 3, 1989) 98a

TABLE OF CONTENTS - CONTINUED

Page

F. Judgment (W.D. Mich. Jan. 3, 1989) . . 117a

G. Relevant Parts of the Michigan Public Employment Relations Act, § 10, Mich. Comp. Laws § 423.210 (1979) . . 119a

H. Relevant Part of Michigan Compiled Laws § 408.477 (1979) 120a

I. Relevant Parts of American Arbitration Association Rules for Impartial Determination of Union Fees (effective June 1, 1986) 121a

J. Memorandum from Bob Chanin, NEA General Counsel, to Executive Directors and Attorneys in Agency Fee States (Sept. 30, 1987) (Dist. Ct. Record 260: Affidavit of Milton L. Chappell, Exhibit 1) 122a

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 4, 8

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 15

Albion Public Schools v. Albion Education Association, 130 Mich. App. 698, 344 N.W.2d 55 (1983), *appeal denied*, 419 Mich. 944 (1984) 16

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 12

Andrews v. Cheshire Education Association, 829 F.2d 335 (2d Cir. 1987) 11, 21

Associated Plumbing & Mechanical Contractors v. Plumbers Local 447, 811 F.2d 480 (9th Cir. 1987) 14-15

Beck v. Communications Workers, 114 L.R.R.M. (BNA) 2523 (D. Md. 1983), *modified*, 776 F.2d 1187 (1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *aff'd*, 487 U.S. 735 (1988) 13

Brock v. Roadway Express, 481 U.S. 252 (1987) . . . 14

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 19

TABLE OF AUTHORITIES - CONTINUED

Page

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 14, 23

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 15-16, 18

Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987) . . . . . *passim*

Ellis v. Railway Clerks, 466 U.S. 435 (1984) . . *passim*

Ellis v. Railway Clerks, 108 L.R.R.M. (BNA) 2648 (S.D. Cal. 1980), *modified*, 685 F.2d 1065 (9th Cir. 1982), *modified*, 466 U.S. 435 (1984) 13

Elrod v. Burns, 427 U.S. 347 (1976) 19

Garabedian v. Allstates Engineering Co., 811 F.2d 802 (3d Cir. 1987) 12

Gwirtz v. Ohio Education Association, 887 F.2d 678 (6th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. ___ (U.S. Feb. 21, 1990) (No. 89-1331) . . . . . *passim*

Hohe v. Casey, 727 F. Supp. 163 (M.D. Pa. 1989) 21

In re Grand Jury Investigation, 542 F.2d 166 (3d Cir. 1976) (en banc, per curiam), *cert. denied*, 429 U.S. 1047 (1977) 21

TABLE OF AUTHORITIES - CONTINUED

Page

Jibson v. Michigan Education Association-NEA, 719 F. Supp. 603 (W.D. Mich. 1989), *appeal docketed*, No. 89-2060 (6th Cir. Sept. 20, 1989) 11

Kidwell v. Railway Clerks, No. HM 85-3804 (D. Md. filed Sept. 6, 1985) 6

Loney v. Scurr, 474 F. Supp. 1186 (S.D. Iowa 1979) 12

Machinists v. Street, 367 U.S. 740 (1961) 12-13

Operating Engineers Pension Trust v. Beck Engineering & Surveying Co., 746 F.2d 557 (9th Cir. 1984) 12

Peters v. Kiff, 407 U.S. 493 (1972) 17

Speiser v. Randall, 357 U.S. 513 (1958) 23

Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) 15

Storer Communications v. Broadcast Employees, 854 F.2d 144 (6th Cir. 1988) 12

Teachers Local 1 v. Hudson, 475 U.S. 292 (1986) . . . . . *passim*

Thor Power Tool Co. v. Commissioner, 439 U.S. 522 (1979) 12

TABLE OF AUTHORITIES - CONTINUED

Page

Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987) 20-22

United States v. Arthur Young & Co., 465 U.S. 805 (1984) 11

CONSTITUTIONS, STATUTES & RULES

U.S. Const. amend. I . . . . . *passim*

U.S. Const. amend. XIV . . . . . i, 3, 4

28 U.S.C.A. § 1254(1) (West Supp. 1989) 2

28 U.S.C. § 1331 (1982) 4

28 U.S.C. § 1343 (1982) 4

Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982) 3-4

Mich. Comp. Laws, § 408.477 (1979) 3-4

Michigan Public Employment Relations Act, § 10, Mich. Comp. Laws § 423.210 (1979) 3-4

TABLE OF AUTHORITIES - CONTINUED

Page

Fed. R. Civ. P. 56 . . . . . 7, 12

Fed. R. Civ. P. 60(b) 7, 12

MISCELLANEOUS

Developments in the Law—Public Employment, 97 Harv. L. Rev. 1611 (1984) 22

F. Elkouri & E. Elkouri, *How Arbitration Works* (4th ed. 1985) 14

O. Fairweather, *Practice and Procedure in Labor Arbitration* (2d ed. 1983) 14-15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

JAMES E. LINDSEY, ROBERT E. FRIAR, AND DAVID STEWART,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners James E. Lindsey, Robert E. Friar, and David Stewart respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on December 12, 1989.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") A, *infra*, 1a) is reported at 893 F.2d 111. The

relevant opinions of the United States District Court for the Western District of Michigan are reported as follows:

(1) its opinion and judgment order granting a permanent injunction, at 643 F. Supp. 1306 (App. B, *infra*, 5a, 64a);[1]

(2) opinions denying motions to dissolve the injunction, at 707 F. Supp. 1473 (App. C, *infra*, 68a) and 707 F. Supp. 1482 (App. D, *infra*, 86a); and,

(3) its opinion dissolving the existing injunction and denying an injunction pending appeal, at 707 F. Supp. 1490 (App. E, *infra*, 98a).

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1) (West Supp. 1989).

---

[1]An opinion denying a motion for partial new trial and to alter or amend the judgment on other grounds is reported at 685 F. Supp. 164, and the judgment was affirmed on other grounds in an opinion reported at 881 F.2d 1388 (6th Cir.), *petition for cert. filed*, 58 U.S.L.W. 3505 (U.S. Jan. 30, 1990) (No. 89-1217). Earlier opinions of the district court that also are not necessary to ascertaining the grounds of the judgment sought to be reviewed, the basis for federal or appellate jurisdiction, or to reviewing the questions presented are reported at 556 F. Supp. 309 (denying motions to dismiss and for abstention and summary judgment) and 556 F. Supp. 316 (denying protective order).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), says in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The state statutes involved are the Michigan Public Employment Relations Act ("PERA"), § 10, Mich. Comp. Laws § 423.210 (1979), and Michigan Compiled Laws § 408.477 (1979). Their pertinent provisions are reprinted, respectively, in Appendix G, *infra*, 119a, and H, *infra*, 120a.

STATEMENT OF THE CASE

Petitioners ("the nonmembers") are three members of the faculty at Ferris State College ("Ferris"), a public institution of higher learning in Michigan. Although not union members, they are employed in a bargaining unit represented exclusively for purposes of collective bargaining by a union, the Ferris Faculty Association ("FFA"). App. B at 6a-7a, 12a.

The FFA is affiliated with the Michigan ("MEA") and National ("NEA") Education Associations. Under an "agency shop" provision in the collective bargaining agreements in effect since 1981, as authorized by the PERA, § 10, Mich. Comp. Laws § 423.210 (App. G, 119a), and Michigan Compiled Laws § 408.477 (App. H, 120a), Ferris automatically deducts from the pay of nonmembers a "service fee" equal to the dues of members of the FFA, MEA, and NEA ("the unions"), "less any amounts not permitted by law." App. B at 6a-11a & n.3. Dues and service fees are spent for a wide range of activities beyond bargaining, contract administration, and grievance adjustment on behalf of the Ferris faculty. *Id.* at 16a-23a, 26a-30a.

On the authority of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the nonmembers object to the exaction of service fees for any purposes other than performance of the FFA's duties as exclusive representative of the Ferris bargaining unit. App. B at 12a. They brought this civil rights action under, *inter alia*, 42 U.S.C. § 1983, claiming that the freedoms and right to due process secured to them by the first and fourteenth amendments are violated, because the procedures for determining the fee and responding to objections to it do not insure that it excludes the costs of other activities. Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343 (1982). In addition to the unions, the governing Board of Control of Ferris, its members and two officers of Ferris, in their official capacities, were named as defendants. App. B at 5a-7a.[2]

The complaint was filed in 1978. However, the proceedings relevant here began on August 25, 1986, with

---

[2]Pursuant to stipulation and order, only injunctive relief was sought against the nonunion defendants. App. B at 6a.

the district court's decision that the service-fee scheme then in effect did not satisfy the procedural requirements under the first amendment enunciated in *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986). App. B at 6a, 58a-64a. The judgment enjoined Ferris "from deducting any future service fees from plaintiffs' salaries until further order." *Id.* at 65a. Jurisdiction was retained "for the sole purpose of determining if and when the union defendants have adopted constitutional procedures" for the collection of fees, in which event the court would dissolve the injunction. *Id.* at 64a.

The unions moved for approval of new procedures in September 1987, based on an affidavit attesting to their adoption. App. C at 69a-70a. Under those procedures, as later revised and approved, an MEA officer determines the unions' expenditures for the prior fiscal year "that were expended on chargeable and non-chargeable activities" and calculates the fee that objecting nonmembers must pay for the current year. App. E at 111a-12a. The MEA sends nonunion employees lists of expenditures made by the unions "by major category, during the [prior] fiscal year verified by an independent auditor and an identification of whether the major category of expense, or a particular portion thereof, is chargeable to objectors"; a statement of the "amount of the reduced agency fee" and "method used to calculate" it; and a copy of the procedures. *Id.* at 112a.

Nonmembers then can challenge the calculation and pay the reduced fee calculated by the MEA into an escrow account. Fees remain escrowed until an "arbitrator * * * selected pursuant to the Rules for Impartial Determination of Union Fees of the American Arbitration Association" ("AAA") issues a "decision on the proportion of the agency fee that is chargeable to non-members." *Id.* at 112a-15a. Under those rules, the arbitrator is not selected by mutual agreement of the unions and challengers, but by

the AAA "from a special panel of experienced labor Arbitrators." The arbitrator is supposed to disclose to the AAA before appointment "any circumstances likely to create a presumption of bias," and participants "may challenge an Arbitrator for cause." However, the rules do not provide for such disclosure to nonmembers, and disqualification is at the discretion of the AAA. App. I, *infra*, 121a.

Opposing approval of the procedure, the nonmembers filed affidavits of a Professor at Harvard University Graduate School of Business Administration, who specializes in the study of financial reporting, and a certified public accountant, who was previously qualified as an expert witness in this and other cases on the subject of accounting as it relates to calculating union service fees. Both experts stated their professional opinion that certified public accountants can, in accordance with generally accepted auditing standards, independently verify a union's chargeability allocations in light of established legal criteria. Dist. Ct. Record 260 ("Record 260"): Affidavits of Professor David F. Hawkins at 5, 19-21, Irving B. Ross at 7-8.

In addition, the nonmembers filed affidavits containing facts showing the participation of unions, including the NEA, in governing the AAA, its selection of the pool of arbitrators for service-fee disputes, and its design of the rules for those disputes. Record 260: Affidavits of Raymond J. LaJeunesse, Jr., Milton L. Chappell (with Depositions of Robert Coulson, Robert E. Meade, & Frank T. Zotto taken in *Kidwell v. Railway Clerks*, No. HM 85-3804 (D. Md. filed Sept. 6, 1985)), Morris E. Eson. They contended that those affidavits demonstrated a lack of impartiality, or at least a genuine issue of material fact for discovery and hearing with regard to whether this scheme satisfies the requirement under *Hudson*, 475 U.S. at 307-08, of an "impartial decisionmaker" for challenges

to a service fee. *See* App. C at 81a-82a; App. E at 105a-07a.

On August 22, 1988, the district court held that in certain respects the new procedures did "not meet the minimum constitutional standards established under *Hudson*." The injunction was continued. App. C at 84a. However, the court also ruled that the independent auditor need not verify the unions' chargeability allocations and that selection of an arbitrator by the AAA "comports with the impartiality requirement set forth in *Hudson*." *Id.* at 73a-74a, 81a-82a. The court treated the unions' motion as brought under Federal Rules of Civil Procedure 56 and 60(b). *See id.* at 71a-73a, 82a.

The unions revised the procedures and moved again to dissolve the injunction. App. D at 87a. Because the revisions appeared to correct the constitutional defects identified by the court, the nonmembers filed no new substantive opposition. Rather, they moved to continue the existing injunction pending an appeal as to their objections, rejected earlier by the district court, to the lack of an audit and to selection of the decisionmaker by the AAA. *Id.* at 94a, 96a-97a; App. E at 101a.

On December 9, 1988, the court held that, except for one sentence, the latest revision was constitutional. It said that, if the offending sentence was deleted, the injunction against the collection of service fees would be dissolved. App. D at 96a. The deletion was made. App. E at 99a. On January 3, 1989, judgment was entered dissolving the injunction, and an injunction pending appeal was denied. App. F, 117a.[3]

---

[3]The opinion of January 3, 1989, is reprinted in Appendix E, 98a, as amended by the district court on February 3, 1989, to correct a clerical mistake.

The employees timely appealed. The court of appeals affirmed per curiam. It held that *Hudson*'s requirements of verification by an independent auditor and an impartial decisionmaker were both met by the MEA's procedure. It said that the verification issue was foreclosed by *Gwirtz v. Ohio Education Association*, 887 F.2d 678 (6th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. ____ (U.S. Feb. 21, 1990) (No. 89-1331), and the impartiality issue, by *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987). App. A at 2a-4a.

REASONS FOR GRANTING THE WRIT

I. IN NOT REQUIRING READILY AVAILABLE PROCEDURAL SAFEGUARDS THAT WOULD MORE CAREFULLY MINIMIZE THE INFRINGEMENT ON NONUNION EMPLOYEES' FIRST-AMENDMENT RIGHTS, THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

State-mandated payment of union fees, even solely for bargaining purposes, infringes significantly upon the first-amendment rights of nonunion public employees to speak and associate freely. *Hudson*, 475 U.S. at 301 & n.8, 307 n.20; *see Abood*, 431 U.S. at 222, 255. Those rights may be infringed only to serve the state interest of reimbursing a union for its costs of statutory exclusive representation. Even then, the procedure for the exaction must "be carefully tailored to minimize the infringement." *Hudson*, 475 U.S. at 301-03 & nn.11-12, 307 n.20.

One of the procedural "constitutional requirements for the Union's collection of agency fees" is an "appropriately justified advance reduction" from the amount of dues to a "proportionate share" of at least arguably chargeable costs and "adequate disclosure" to nonmembers of "the basis for the fee," including "verification by an independent audi-

tor." *Id.* at 306-07 & n.18, 309-10. Another prerequisite is "a reasonably prompt opportunity" for nonmembers "to challenge the amount of the fee before an impartial decisionmaker." *Id.* at 307-08, 310.

Except for indicating that it must "provide adequate justification for the advance reduction of dues," *Hudson* did not detail the nature of the "verification by an independent auditor" that it contemplated. *Id.* at 307 n.18, 309. Also, except for holding that it could "not represent the Union's unrestricted choice," and that "a full-dress administrative hearing" is unnecessary, the Court did not specify what method of selection satisfies the requirement of impartiality in the decisionmaker who reviews challenges to the reduced fee. *Id.* at 308 & n.21. Both of those important questions of first-amendment procedural due process are presented by this case. The answer of the court of appeals to each conflicts with the underlying holding of *Hudson*, and one of the holdings of *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), by approving a procedure that less effectively protects nonmembers' first-amendment interests than readily available alternatives.

A. An Independent Audit of the Union's Calculation of Chargeable Costs Is Readily Obtainable and Provides More Assurance That the Fee Exacted Will Not Be Excessive Than Mere Verification That Expenditures Were Made and That the Arithmetic Is Correct

The holding of *Hudson* requiring "verification by an independent auditor" is part of the Court's ruling that the information disclosed to nonmembers about the basis for the fee must "identif[y] the expenditures for collective bargaining and contract administration." 475 U.S. at 306-07 & n.18. In context, it is that identification of expenses as chargeable that must be verified, for that is the clas-

sification most "informati[ve] about the basis for the proportionate share." *Id.* at 306.

In this case, the court of appeals simply followed its earlier decision concerning verification in *Gwirtz*. App. A at 2a-3a. Despite *Hudson*, *Gwirtz* denied "that the function of the independent auditor is to verify the union's calculation of the chargeable or nonchargeable nature of the major categories of union expenditures." Rather, it held, the "auditor's role is to verify * * * that the expenditures that the union claims it made for particular expenses were actually made for those expenses." *Gwirtz*, 887 F.2d at 682 n.3.

The courts below held that the *Gwirtz* standard was met here, because they believed that the MEA's procedures "require the independent auditor to verify the union's calculations and disbursements," App. A at 2a, *i.e.*, check the MEA's arithmetic and "verify that the expenditures were actually made in the categories determined by the union defendants to be chargeable or nonchargeable," App. C at 73a. To the contrary, the MEA's procedures provide for verification of neither the calculations nor expenditures after the MEA determines whether they are chargeable or not.

The procedures state that nonmembers will be given "list[s] of expenditures made by the [unions], by major category, during the [prior] fiscal year verified by an independent auditor." Those *unallocated* lists are the *only* information that *the procedures say* will be verified. Nonmembers also will be sent "an identification of whether the major category of expense, or a particular portion thereof, is chargeable to objectors," the "amount of the reduced agency fee," and "method used to calculate the reduced agency fees," but the procedures do *not* say that any of those items will be verified. App. E at 112a. Thus,

even *Gwirtz* is not satisfied by the MEA's procedures on their face.[4]

Moreover, the proposition underlying the decisions in this case and *Gwirtz* is contrary to both the record here and precedent. That is the erroneous view, first advanced in *Andrews v. Cheshire Education Association*, 829 F.2d 335, 340 (2d Cir. 1987), that an auditor cannot verify a union's calculation of the chargeable and nonchargeable nature of its expenses, because that "would have the auditor making a legal, not an accounting, decision." *Accord* App. A at 3a; *Gwirtz*, 887 F.2d at 682 n.3.

None of the lower court decisions on this issue cite a single accounting text or expert opinion for the premise that an auditor cannot verify whether legal standards and hard data in fact exist which reasonably support a union's calculation of chargeable costs. While accountants do not *make* legal decisions, they often review statutes and case law to *evaluate* clients' legal positions in accounting matters. Accountants must do so, this Court has said, because they have obligations to third parties that require them to ascertain independently and report whether clients' claims are properly stated. *See, e.g., United States v. Arthur Young & Co.*, 465 U.S. 805, 812, 817-19 (1984).

---

[4]When the MEA's procedures were applied for the 1988-89 fee, the auditors apparently provided *Gwirtz*-type services, but not the verification required by *Hudson*. *See Jibson v. Michigan Educ. Ass'n-NEA*, 719 F. Supp. 603, 606 (W.D. Mich. 1989), *appeal docketed*, No. 89-2060 (6th Cir. Sept. 20, 1989). However, that is irrelevant here, because in this case the courts below considered the MEA's procedures solely *on their face*. App. C at 70a-71a; App. E at 101a-05a. If their approval is not reversed, the unions would be free to dispense with even *Gwirtz*-type services. It should be noted that the adequacy of the verification was not at issue in *Jibson*, only the sufficiency in other respects of the information disclosed to nonmembers. *See* 719 F. Supp. at 607-10.

Blind deference to a client's legal views is particularly inappropriate when the client's self-interest is adverse to the interests of others who must rely on the accounting, *e.g.*, in tax accounting. *See Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 544 (1979). That is true here, where the union's interest is in maximizing the fee and minimizing objections, and the self-serving representations of union officials cannot be considered fair and objective. *See Hudson*, 475 U.S. at 308.

The courts below ignored the only evidence in the record on this issue. The record includes the professional opinions of two accounting experts that certified public accountants can, in compliance with generally accepted auditing standards, verify independently a union's chargeability allocations in light of established legal criteria. Record 260: Hawkins Affidavit at 5, 19-21, Ross Affidavit at 7-8. That uncontradicted evidence must be credited on this appeal, because the unions' motion to dissolve the injunctive provisions of the 1986 judgment was summarily granted without hearing. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).[5]

The experts' opinions are consistent with common sense and precedent. As early as *Machinists v. Street*, 367

---

[5]Where, as here, a party moves to vacate a judgment under Federal Rule of Civil Procedure 60(b) based on changed factual circumstances shown by affidavit, the standard is the same as for a summary judgment motion under Rule 56: if affidavits "demonstrate the existence of a genuine dispute of material fact," the motion cannot be resolved without an evidentiary hearing. *Garabedian v. Allstates Eng'g Co.*, 811 F.2d 802, 803-04 (3d Cir. 1987); *accord Loney v. Scurr*, 474 F. Supp. 1186, 1191 (S.D. Iowa 1979). When such a motion has been granted summarily, the appellate courts "apply a *de novo* standard of review, making all reasonable inferences in favor of the party who did not move for summary judgment." *Storer Communications v. Broadcast Employees*, 854 F.2d 144, 146 (6th Cir. 1988) (citations omitted); *accord, e.g., Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying Co.*, 746 F.2d 557, 561 (9th Cir. 1984).

U.S. 740, 796 (1961) (Black, J., dissenting), warning that "the Court's remedy may prove very lucrative to special masters, accountants and lawyers," it was recognized that determining chargeable costs is basically an accounting problem. In both *Ellis v. Railway Clerks*, 108 L.R.R.M. (BNA) 2648, 2650 (S.D. Cal. 1980), *modified on other grounds*, 685 F.2d 1065 (9th Cir. 1982), *modified*, 466 U.S. 435 (1984), and *Beck v. Communications Workers*, 114 L.R.R.M. (BNA) 2523, 2524 (D. Md. 1983), *modified on other grounds*, 776 F.2d 1187 (1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *aff'd*, 487 U.S. 735 (1988), the district courts ordered remedies which required auditors to verify the union's calculation of the chargeable and non-chargeable nature of its expenditures.

Indeed, *Hudson* itself assumed that accountants can audit chargeability allocations. *Hudson*, 475 U.S. at 310 (emphasis added), held that a union need not establish a 100% escrow, but only if there is "*a certified public accountant's verified breakdown* of expenditures, including some categories that no dissenter could reasonably challenge."

A properly conducted independent verification of a union's allocation of expenses and calculation of the reduced fee is not only possible, but also minimizes the infringement of the agency shop on nonmembers' first-amendment rights. It facilitates the making of intelligent decisions by nonmembers to challenge the fee or not by insuring that the data disclosed to them is more complete, informative, and reliable. *See* Record 260: Ross Affidavit at 5-8, Hawkins Affidavit at 15-19. Such an audit also reduces the risk that the fee collected from objecting nonmembers will include nonchargeable costs. It provides a preliminary check on the self-interest of the union officials who calculate the fee, for, as the accounting experts explained, an independent audit adds to the

reliability of any financial statement. *Id.*: Ross Affidavit at 4-8, Hawkins Affidavit at 3-16.[6]

B. Mutual Selection or Appointment by a Governmental Agency Are Readily Available, and Fairer, Alternatives to Selection of the "Impartial Decisionmaker" by a Private Organization of the Union's Unilateral Choice and Over Which It Has Influence

Hudson, 475 U.S. at 308 n.21 (emphasis added), speculated in *dicta* "that an expeditious arbitration *might* satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice." On the authority ~~of its~~ prior decision in *Damiano*, 830 F.2d at 1371-72, the court of appeals held that sufficient impartiality exists where the decisionmaker is named by a wholly private organization, the AAA, chosen unilaterally by the unions to make that appointment. App. A at 3a. Even without considering other facts as to the AAA, there obviously are readily available, fairer methods of selecting a decisionmaker for challenges to service fees.

A "fundamental characteristic of arbitration" is mutual "selection of the arbitrators by the parties to the dispute." *Associated Plumbing & Mech. Contractors v. Plumbers Local 447*, 811 F.2d 480, 483-84 (9th Cir. 1987); *see* F. Elkouri & E. Elkouri, *How Arbitration Works* 135-37 (4th ed. 1985); O. Fairweather, *Practice and Procedure in Labor*

---

[6]Thus, requiring an audit of the chargeability allocations before service fees are exacted is consistent with due process. Property may be taken before a full evidentiary hearing only if *pre-deprivation* "procedures establish a reliable 'initial check against mistaken decisions.'" *Brock v. Roadway Express*, 481 U.S. 252, 263 (1987) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985)).

Arbitration 79-90 (2d ed. 1983) (texts cited in *Hudson*, 475 U.S. at 308 n.21). Thus, one readily available and fairer alternative to selection by the AAA is mutual selection by the union and nonmembers or representatives of their interests, *e.g.*, the National Right to Work Legal Defense Foundation.

Another is appointment by a government agency, *e.g.*, the Federal Mediation and Conciliation Service or a state labor agency. It may be presumed that governmental adjudicators are impartial. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-21 (1986).[7] However, no such presumption attaches where nongovernmental decision-makers are not mutually selected by both parties to a dispute. *See Steele v. Louisville & N.R.R.*, 323 U.S. 192, 206 (1944); *Associated Plumbing & Mech. Contractors*, 811 F.2d at 483-84.

Moreover, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968); *see Aetna Life Ins. Co.*, 475 U.S. at 825. Here, the appearance—and actuality—of bias is shown by more than just the fact that nonmembers play no part in selecting the AAA or the individual arbitrator who determines their constitutional challenges.

The nonmembers submitted affidavits[8] demonstrating the influence of unions, *including defendant NEA*, over the

---

[7]The cases cited by *Damiano*, 830 F.2d at 1371-72 & n.9, for the proposition that "generalized bias" is not a sufficient basis on which to reject selection by the AAA all involved federal or state judges or a state administrative tribunal appointed by a government official, not a nongovernmental decisionmaker selected by a private organization.

[8]That uncontradicted evidence must be credited. *See supra* note 5 and accompanying text.

governance of the AAA, the composition of the pool of arbitrators from which the AAA selects the decisionmaker, and the design of the special rules for determining challenges to agency fees, *e.g.*:

- The AAA's Board of Directors includes the Executive Director of the NEA, a partner in the law firm of the NEA's General Counsel, the arbitrator who served as the NEA's hand-picked decisionmaker under its invalid pre-*Hudson* rebate procedure, and numerous other union officials and attorneys who regularly represent unions or have served them in other capacities. Record 260: Coulson Deposition, Exhibit 44, Chappell Affidavit ¶¶ 8-9 & Exhibit 1, LaJeunesse Affidavit ¶¶ 5-9.

- The arbitrators in the pool for service-fee cases had to be recommended and regularly employed by unions to arbitrate disputes between them and management, but no effort was made to determine their acceptability to nonunion employees. *Id.*: Coulson Deposition at 132-37, 146-55, 159-65, 173-75, Meade Deposition at 17-22, 63-73, 136-38.[9] Indeed, one of the arbitrators put in the pool by the AAA was the NEA's hand-picked decisionmaker under its pre-*Hudson* procedure and expert witness for another union in a service-fee case.

---

[9]It is reasonable to infer that arbitrators whose livelihood depends upon employment by unions to arbitrate disputes with management, but who have no commensurate financial interest in being fair to nonmembers, inevitably have at least an unconscious bias toward unions in service-fee disputes. *Cf. Albion Public Schools v. Albion Educ. Ass'n*, 130 Mich. App. 698, 702-03, 344 N.W.2d 55, 57-58 (1983), *appeal denied*, 419 Mich. 944 (1984) (arbitrator's employment by union to resolve agency-shop disputes in intra-union scheme "might reasonably give someone who is considering his services as an arbitrator [in a labor dispute with the union] the impression that he might favor one litigant over the other"); *see generally Commonwealth Coatings Corp.*, 393 U.S. at 147-50.

Id.: Coulson Deposition at 133-34, LaJeunesse Affidavit ¶¶ 6-7.

- Union lawyers, including the NEA's General Counsel, were instrumental in developing the AAA's "Union Fees" rules, but nonmembers and their representatives had no meaningful input. *Id.*: Coulson Deposition at 115-34, Exhibits 5, 8-9.

The court of appeals followed *Damiano*, 830 F.2d at 1371-72, in concluding that, although the nonmembers' proofs evidenced "a generalized bias on the part of some members of the panel of prospective arbitrators," that was "insufficient to raise a genuine issue of material fact." *See* App. A at 3a. That rationale conflicts with the logic of this Court's cases on the due-process right to an impartial tribunal, including *Hudson*.

As Justice Marshall said in *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (plurality opinion), "even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." Consequently, the scheme for selecting an arbitrator was struck down in *Hudson*, 475 U.S. at 308, not because there was proof that any particular arbitrators were biased, but because the arbitrator's "selection represents the Union's unrestricted choice from the state list." In other words, the *general system* presented an unacceptable appearance and risk of bias, even though all individuals on the state's list may have been without actual bias.

The court of appeals, in *Damiano* and here, also relied on the fact that the AAA's rules "provide an opportunity for the participants to challenge the selection of a particular arbitrator for identifiable bias." *Damiano*, 830 F.2d at 1372; *accord* App. A at 3a. That "opportunity" is completely hollow. The rules for "Union Fees" require

the arbitrator to disclose to the AAA before appointment "any circumstances likely to create a presumption of bias," and allow nonmembers to "challenge an Arbitrator for cause." However, unlike the AAA's general rules for arbitration, these special rules do not require the AAA to disclose such circumstances *to the parties to the dispute* (*i.e.*, nonmembers), and disqualification is at the *discretion of the AAA*, not peremptory unless waived by both parties. *Compare* App. I, 121a, *with Commonwealth Coatings Corp.*, 393 U.S. at 149.

The record in this case contains evidence that the AAA has in fact applied these rules to deny nonmembers an impartial decisionmaker. In one service-fee arbitration, the AAA selected a former employee of a union as arbitrator, but did not disclose that fact to the objecting nonmembers. When one of them discovered that fact independently and challenged for cause, the AAA refused to remove the arbitrator. R. 260: Eson Affidavit. And, of course, even if the AAA disqualifies one arbitrator, the replacement is chosen from the same polluted pool as the first.

C. This Court's Decisions in *Ellis* and *Hudson* Hold That a Service Fee Collection Procedure Is Inadequate If There Are Readily Available Alternatives Which Provide Greater Protection for the Rights of Nonmembers

In *Gwirtz*, 887 F.2d at 682, the court of appeals held that "*Hudson* does not mandate a union to utilize the *most* detailed and effective service available to audit the financial information disclosed to nonmember employees." In this case, the district court ruled that the "fact that 'fairer' procedures may arguably exist is irrelevant" in determining whether "use of the AAA comports with the impartiality requirement set forth in *Hudson*." App. C at 82a. Thus, in following *Gwirtz* and affirming the district court despite

the existence of readily available audit services and methods of selecting a decisionmaker that provide greater protection for nonmembers, the court of appeals here refused to follow the strict test which this Court applies in all first-amendment cases.

That test is that infringements on first-amendment freedoms can be justified only if they "further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end." *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (plurality opinion). The Court has never indicated that there is some "union fee exception" to that traditional first-amendment strict scrutiny. On the contrary, it has declared that "regulation of First Amendment rights is *always* subject to exacting judicial review." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981) (emphasis added). And, in particular, it applied the "least restrictive means" test at least twice in agency-fee cases.

First, in *Ellis*, 466 U.S. at 443-44, the Court implicitly applied that exacting standard to require unions to utilize "advance reduction of dues and/or interest-bearing escrow accounts" to ensure that objecting nonmembers' money is not committed to improper uses even temporarily. Where "there are readily available alternatives * * * that place only the slightest additional burden, if any, on the union," the Court held, those alternatives must be used.

Then, in *Hudson*, 475 U.S. at 303 & nn. 11-12, the Court explicitly relied on the "least restrictive means" test, citing *Elrod* and other authorities to the same effect, in reaching the conclusion that "the First Amendment requires that the procedure [for determining service fees and responding to objections] be carefully tailored to minimize the infringement" on nonmembers' rights. After *Ellis* and *Hudson*, there is no principled basis for allowing a union to disclose financial information which provides

less assurance that its calculation of a service fee is properly stated than is readily obtainable through meaningful independent verification. Nor is there any justification for selecting the decisionmaker for challenges to fees in a manner that is less fair than other readily available methods. In permitting both, the decisions below conflict with *Ellis* and *Hudson*.

II. THE DECISIONS OF THE LOWER COURTS ARE IN CONFLICT AS TO THE NATURE OF THE INDEPENDENT VERIFICATION REQUIRED BY *HUDSON*, AS COUNSEL FOR THE UNIONS HAS CONCEDED

In *Tierney v. City of Toledo*, 824 F.2d 1497, 1505-06 (6th Cir. 1987) (emphasis added), the Sixth Circuit held that a service-fee procedure was constitutionally inadequate, because it provided neither an advance reduction from dues "that represents the *independently audited* percentage" of clearly nonchargeable union expenditures nor an independently audited advance disclosure to nonmembers. For the disclosure to be adequate, the court ruled, the "*independent auditor must* verify each major category * * * of expenses and *indicate which categories comprise each component*." The "components" which *the auditor* must "indicate" were identified by the court as "that component undeniably for ideological purposes," "that sum which, by independent audit, indisputably relates to the negotiation and administration of the collective bargaining agreement," and "the difference." *Id.* at 1504 (emphasis added). Then, in *Damiano*, 830 F.2d at 1370, the Sixth Circuit held that *Hudson* "mandates the verification of the union's calculations [of the reduced fee] and disbursements from the fund by means of an independent auditor," citing *Tierney*, 824 F.2d at 1504.

The conflict on the verification issue between *Tierney* and *Damiano*, on the one hand, and this case, *Gwirtz*, and *Andrews* (which *Gwirtz*, 887 F.2d at 682-83, explicitly followed), on the other, could not be more obvious. *See Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989) (citing *Andrews* and *Tierney* as contrary).[10] Here, the court of appeals rejected the nonmembers' argument that the prior cases were inconsistent with the observation that it "considered a petition for rehearing en banc and declined to rehear *Gwirtz*." App. A. at 3a. However, the failure of a petition for rehearing en banc to achieve the number of votes necessary for rehearing "does not * * * imply any judgment on the merits and has no jurisprudential significance." *In re Grand Jury Investigation*, 542 F.2d 166, 173 (3d Cir. 1976) (en banc, per curiam), *cert. denied*, 429 U.S. 1047 (1977).

A panel of a court of appeals cannot reconcile conflicting decisions of prior panels simply by refusing to acknowledge the conflict. Not only is there a clear conflict between *Tierney* and *Damiano*, on the one hand, and this case, *Gwirtz*, and *Andrews* (and other lower court decisions which follow it), on the other, but it is a conflict which counsel for the unions identified, and indicated was worthy of this Court's consideration, in an admission against interest that is in the record in this case. In a memorandum dated September 30, 1987, announcing the Second Circuit's decision in *Andrews* to Executive Directors and attorneys for affiliates of the NEA in states authorizing

---

[10] *Hohe*, 727 F. Supp at 167, followed *Tierney* and held that the independent auditor must audit the "breakdown between chargeable and non-chargeable costs." It further ruled that the audit must "be conducted in accordance with generally accepted auditing standards sufficient for the auditor to be able to form an opinion that the financial information is fairly stated in all material respects," which requires the auditor to perform an "evaluation of the client's internal controls [and] an investigation" into whether that breakdown is supported by "'sufficient competent evidential matter.'" *Id.* at 165-67.

agency shops, Robert Chanin, General Counsel for the NEA and attorney for the unions in the court of appeals in this case, said:

> The position taken by the Second Circuit regarding *Hudson's* auditing requirement appears to be *in conflict* with the position taken by the Sixth Circuit in its July 27, 1987 decision in *Tierney, et al. v. City of Toledo*. If a petition for a writ of certiorari is filed in one or both of these cases, *the Supreme Court may well agree to consider the issue*.

App. J at 122a-23a (emphasis added).[11]

III. BOTH QUESTIONS PRESENTED BY THIS CASE SHOULD BE SETTLED BY THIS COURT, BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF DUE PROCESS IN PROTECTING FIRST-AMENDMENT FREEDOMS

The questions presented here are very important due to the large numbers of public employees whose first-amendment freedoms are burdened by agency-shop requirements. As of 1984, compulsory unionism provisions for public employees were statutorily authorized in some twenty states. *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1727 & nn. 8-12 (1984).

The case is exceptionally important because of more than numbers, moreover. In protecting first-amendment freedoms, "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied."

---

[11]This memorandum also raises questions as to the bias of the AAA, because it shows that a copy was sent to Robert Coulson. App. J at 123a. Coulson is the President of the AAA. Record 260: Coulson Deposition at 3. Why was the President of the supposedly impartial AAA on the distribution list for an internal communication of the NEA?

Speiser v. Randall, 357 U.S. 513, 520 (1958); *see Hudson*, 475 U.S. at 303 n.12. The Court twice recognized that principle in this context by granting certiorari in *Hudson* and *Ellis* to consider the constitutionality of procedures adopted by unions to determine the amount of compulsory deductions and respond to nonmembers' objections. Indeed, in *Hudson*, 475 U.S. at 294, 300, the only questions presented concerned procedures, and the Court explicitly cited the "importance of the case" as a reason for granting certiorari.

Both questions presented here arise directly from *Hudson*, and both are fundamental. The nature of the "verification by an independent auditor" required by *Hudson*, 475 U.S. at 307 n.18, is exceptionally important, because that is the *only* "initial check against mistaken decisions," *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985), in calculating the amount exacted from nonmembers that *Hudson* prescribed. Without full, independent verification before deductions begin, a union has unfettered discretion to deprive nonmembers of use of part of their wages, subject only to a possible later refund if they challenge the amount. The method of selecting the decisionmaker for determining challenges is also fundamental, because that determination, if infected by bias, can enable the union to spend dissenters' fees on political and ideological purposes to which they are opposed.

CONCLUSION

This case and *Gwirtz*, No. 89-1331, both present the issue of what *Hudson*, 475 U.S at 307 n.18, meant by "verification by an independent auditor." Because the record on that issue is more fully developed in *Gwirtz*, but *Gwirtz* does not present the equally important issue of what satisfies the requirement of impartiality in the decisionmaker for challenges to compulsory fees, the Court

should grant certiorari in both and consider the cases together.

Moreover, regardless of the Court's disposition of the petition in *Gwirtz*, this case is independently worthy of plenary review, because the lower courts here seriously misapplied the Court's decisions in *Hudson* and *Ellis*. Therefore, this petition should be granted in any event to reaffirm once and for all that there is no "union fee exception" to the first-amendment "least restrictive means" test, and to clarify that both the independent verification and impartial review prescribed in *Hudson* are *meaningful* safeguards for the first-amendment freedoms of nonunion employees, not the mere window-dressing approved below.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel of Record for Petitioners

March 1990

APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

December 12, 1989

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 89-1101

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES P. LEHNERT, et al., *Plaintiffs-Appellants,*	)	ON APPEAL from the United States District Court for the Western District of Michigan
v.	)	
THE FERRIS FACULTY ASSOCIATION-MEA-NEA, et al., *Defendants-Appellees.*	)	

Decided and Filed December 12, 1989

Before: MILBURN and GUY, Circuit Judges; and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge. In this action non-union public employees sued under 42 U.S.C. § 1983 for an injunction and other relief from a collective bargaining agreement permitted under state law that they alleged compelled them to pay to the defendant union an unconstitutional "service fee" as a condition of employment. The district court granted an injunction upon holding that insofar as it contained a service fee arrangement the collective bargaining agreement between the public employer and the exclusive bargaining agent did not satisfy

the constitutional requirements enunciated by the Supreme Court in *Chicago Teachers Union, Local No. 1. v. Hudson*, 475 U.S. 292 (1986). The injunction prohibited the public employer from deducting service fees from the plaintiffs' salaries in the future until further order of the Court, and retained jurisdiction "for the sole purpose of determining if and when the union defendants have adopted constitutional procedures" for collection of fees. The judgment provided that in the event constitutional procedures were adopted the district court would dissolve the injunction.

After several modifications of the procedures that the court found deficient, on December 9, 1988, the district court held that, except for a single sentence, the latest revision of the procedures met constitutional standards. The court stated that it would dissolve the injunction if the one sentence so identified were deleted. The union by affidavit advised the court that the sentence had been deleted, and on January 3, 1989, the court dissolved the injunction against the collection of service fees and denied an injunction pending appeal. The nonunion employees appealed and the case was submitted following oral arguments.

The plaintiffs raise three issues on appeal. First, they contend that the safeguards required by the Constitution are not satisfied because the procedures do not require independent auditors to verify the calculation of the service fees. The procedures which the district court approved require the independent auditor to verify the union's calculations and disbursements, but do not require the independent auditor to make a determination as to the chargeability of fees in each category. Upon consideration, we conclude that this issue is foreclosed by previous decisions of this court. The procedure approved by the district court satisfies the requirements set forth in *Tierney v. City of Toledo*, 824 F.2d 1497, 1504 (6th Cir. 1987), that "[t]he independent auditor must verify each major category

in the union's budget or expenses for each major category of expenses and indicate which categories comprise each component." In *Gwirtz v. Ohio Educational Association*, __ F.2d __ (6th Cir. No. 88-4126, decided October 11, 1989), we interpreted *Tierney* to not require the independent auditor to make a determination of chargeability, which is essentially a legal determination. Upon suggestion that *Gwirtz* was inconsistent with *Tierney* with respect to this issue, the court considered a petition for rehearing en banc and declined to rehear *Gwirtz*.

Second, the plaintffs argue that the district court committed error in summarily approving selection of an impartial decision maker by the American Arbitration Association without discovery by plaintiffs or a hearing. The basis of argument is the plaintiffs' claim that the American Arbitration Association has an inherent bias against nonunion members; that its panels are impartial only as between unions and employers. Upon consideration, we conclude that this court has decided this issue in *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987). In *Damiano*, we rejected a claim of "generalized bias" against the American Arbitration Association and pointed out that the American Arbitration Association's Rules for Impartial Determination of Union Fees, effective June 1, 1986, contain several safeguards against bias or prejudice by an arbitrator. *Id.* at 1368. If the plaintiffs perceive a proposed or selected arbitrator as biased, these safeguards are available to them as a means of challenging the appointment.

Third, the plaintiffs argue that the district court should not have dissolved its injunction, but should have modified the existing injunction to provide that the collection of fees from nonunion employees be prohibited except in accordance with the procedures now approved by the court. We find no abuse of discretion in dissolving the injunction (when entered, the injunction provided that it would be

dissolved upon adoption of a constitutional scheme) or in permitting the union to incorporate the provisions of the approved procedures by reference into the collective agreement rather than setting the new procedures out verbatim therein.

The complaint in this case was filed on May 22, 1978. The district court has given careful consideration to every argument put forward by the plaintiffs and has required the union to "toe the line" in fashioning a process for imposition of service fees that fully meets the constitutional standards enunciated by the Supreme Court in *Hudson*. An examination of the record discloses a meticulous attention to detail by the district court and a result that satisfies *Hudson* as interpreted by our later decisions.

The judgment of the district court is affirmed.

APPENDIX B

OPINION AND JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

August 25, 1986

James P. LEHNERT, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman, Plaintiffs,

v.

The FERRIS FACULTY ASSOCIATION-MEA-NEA, Michigan Education Association, National Education Association of the United States, the Board of Control of Ferris State College, S. Eugene Bychinsky, Robert L. Ewigleben, Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, Defendants.

No. G 78-346.

United States District Court,
W.D. Michigan, S.D.

Aug. 25, 1986.

OPINION

ENSLEN, District Judge.

Plaintiffs bring this action under 42 U.S.C. §§ 1983, 1985, 1986 claiming violations of rights secured to them by the first and fourteenth amendments to the United States Constitution. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343. Specifically, plaintiffs allege that they are required by state law to pay to the defendant unions an agency shop or service fee in lieu of union dues and that this agency shop fee is not applied by the unions exclusively to purposes germane to their duties as collective bargaining representative for plaintiffs' bargaining unit. Plaintiffs also claim that the procedures implemented by

the unions to determine and collect service fees are inadequate. Plaintiffs argue that defendants' practices violate their constitutional rights. Both damages and injunctive relief are sought against the union defendants. However, pursuant to an approved stipulation contained in the Pretrial Order of January 15, 1985, solely injunctive relief is sought against the nonunion defendants. Pretrial Order at 89-90. On the basis of this stipulation, the nonunion defendants did not participate at trial.

This case was originally filed in this district on May 22, 1978, and was ultimately tried to the bench over 12 trial days in January and April of this year. The court entertained the testimony of 12 witnesses and accepted 90 exhibits into evidence. The parties completed their post-trial briefing on June 6. This opinion is entered pursuant to Fed.R.Civ.P. 52(a).

I. FINDINGS OF FACT

A. Stipulated Facts

Plaintiffs James P. Lehnert, Elmer S. Junker, James E. Lindsey and John R. Schauble are tenured members of the faculty of Ferris State College (Ferris). Plaintiffs Theodore D. Speerman and Sam C. Peticolas were tenured members of the Ferris faculty until their respective retirements on November 22, 1978 and May 15, 1982.

Defendant Ferris Faculty Association-MEA-NEA (FFA), an affiliate of the Michigan Education Association (MEA) and the National Education Association (NEA), has served as the exclusive bargaining representative of the faculty of Ferris pursuant to Mich.Comp.Laws § 423.211 at all times pertinent to this case. Pursuant to the unified membership concept, membership in the FFA also constitutes membership in the MEA and NEA. The MEA is

a Michigan corporation; the NEA is incorporated under a special act of the United States Congress.

Defendant Board of Control of Ferris State College is a public body corporate established and existing under the constitution and laws of the State of Michigan. Mich. Const. art. VIII, § 6; Mich.Comp.Laws § 390.801 *et seq.* It is empowered to control and manage Ferris.[1] In addition to the Board of Control, other nonunion defendants are the individual members of the Board of Control and the President and Vice-President for Business Affairs of Ferris, in their official capacities.

Since on or about February 22, 1975, the FFA and Ferris have entered into successive collective bargaining agreements containing agency shop provisions.[2] After the FFA and Ferris entered into their first agency shop agreement, the authorizing statute, Mich.Comp.Laws § 423.210, was challenged in the Michigan courts and eventually appealed to the United States Supreme Court. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court upheld the constitutionality of the statute and outlined the permissible uses of agency shop fees in public employee unions. The concept of the current agency shop provision was proposed thereafter by Ferris during factfinding upon the advice of

---

[1]Ferris is an agency and arm of the State of Michigan, established by the state's constitution and required to be funded by the state. Mich. Const. art. VIII, § 4.

[2]The original agency shop provision was included in the labor contract pursuant to the authority of 1973 Mich.Pub. Acts 25, § 1, codified at Mich.Comp.Laws § 423.210. This early provision stated that all members of the bargaining unit not belonging to the FFA were required to pay agency shop fees equivalent to union dues. The provision also authorized the President of the college, acting as the agent of the Board of Control, to discharge any member of the bargaining unit who failed to comply.

its counsel and with the intent of complying with *Abood*.[3]

---

[3]Section 2.6 of union defendants' exhibit I is the agency shop provision of the collective bargaining agreement between Ferris and the FFA for 1981-1984. That section provides, in pertinent part:

> A. Each employee covered by the negotiated Agreement between the Board of Control of Ferris State College and the Ferris Faculty Association (Dated November 19, 1981) shall, as a condition of employment, on or before thirty-one (31) days from the date of commencement of professional duties or July 1, 1981, whichever is later, join the Ferris Faculty Association or pay a *service fee to the Association equivalent to the amount of dues uniformly required of members of the Ferris Faculty Association, less any amounts not permitted by law*; provided, however, that the bargaining unit member may authorize payroll deduction for such fee. *In the event that a bargaining unit member shall not pay such service fee directly to the Association or authorize payment through payroll deduction, the College shall, at the request of the Association, deduct the service fee from the bargaining unit member's salary and remit the same to the Association under the procedure provided below.*
>
> B. The procedure in all cases of non-payment of the service fee shall be as follows:
>
> 1. The Association shall notify the bargaining unit member of non-compliance by certified mail, return receipt requested, explaining that he or she is delinquent in not tendering the service fee, specifying the current amount of the delinquency, and warning him or her that unless the delinquent service fees are paid or a properly executed deduction form is tendered within fourteen (14) days, he or she shall be reported to the College and a deduction of service fee shall be made from his or her salary.
>
> 2. If the bargaining unit member fails to comply, the Association shall give a copy of the letter sent to the delinquent bargaining unit member and the following written notice to the College at the end of the fourteen (14) day period:
> The Association certifies that (name) has failed to tender the periodic service fee required as a condition of employment under the 1981-84 Faculty Agreement and demands that under the terms of this Agreement, the College shall deduct the delinquent service fees from the collective bargaining unit member's salary. The Association certifies that the amount of the service fee includes only those items authorized by law.
>
> 3. The College upon receipt of said notice and request for deduction, shall act pursuant to Section A above. In the event of compliance at any time prior to deduction, the request for deduction will be withdrawn. The Association, in enforcing this

There are three principal differences between the early agency shop provisions and those in effect since November 19, 1981. The first difference is that under the present provision, Ferris does not discharge nonunion members for failure to pay the service fee. Rather, as authorized by Mich.Comp.Laws § 408.477, Ferris will now deduct the

---

provision, agrees not to discriminate between bargaining unit members.

C. With respect to all sums deducted by the College pursuant to this Article, The College agrees promptly to disburse said sums directly to the Association.

D. Bargaining unit members paying the service fee provided for herein or whose service fees have been deducted by the College from their salaries may object to the use of their service fee for matters not permitted by law. *The procedure for making such objections is that officially adopted by the Association.* A copy of the Association policy will be provided by the Association upon a request of a bargaining unit member.

. . . .

F. This Article shall be effective for each academic year of this Agreement and all sums payable hereunder shall be determined from the beginning of each academic year. Persons becoming members of the collective bargaining unit during the course of an academic year shall have their service fee prorated over the academic year.

. . . .

I. The Association will certify at least annually to the College, fifteen (15) days prior to the date of the first payroll deduction for professional fees or service fees, the amount of said professional fees and the amount of the service fee to be deducted by the College, and that said service fee includes only those amounts permitted by the Agreement and by law.

J. Should the provisions of 2.6, Agency Shop, be found contrary to law as a result of a final decision for which no appeal is processed, and which is binding on the parties to this Agreement, the parties agree to meet on written request of either party to negotiate to bring Section 2.6 into compliance with any such final decision, such negotiations to be limited to the provisions of Section 2.6 and will not affect the terms and conditions of this Agreement which shall remain in full effect for the life of this Agreement. [Emphasis added.]

The agency shop provision of the 1984-1987 collective bargaining agreement between Ferris and the FFA is identical in all respects to its immediate predecessor.

appropriate service fee from the paycheck of the dissenting member of the bargaining unit after due notice and opportunity to comply. The second distinction of the modern agency shop provision is that the service fees are now computed as the equivalent to the amount of the dues required of FFA members, "less any amounts not permitted by law." The third and final major change is that dissenting members of the bargaining unit may now "object to the use of the service fee for matters not permitted by law" by utilizing the procedure "officially adopted by the Association."

Pursuant to stipulations and orders entered on April 21, 1983, and October 22, 1984, to avoid litigation expense and time, defendant unions have refunded, or agreed to refund, with simple interest, all service fees paid by plaintiffs, and waived any claims they might have had against plaintiffs for service fees not paid, for periods prior to the 1981-1982 fiscal year (September 1, 1981 to August 31, 1982). Pursuant to the stipulation and order entered April 21, 1983, plaintiffs have deposited with the registry of the court the MEA's and FFA's portions of the service fees demanded for the 1981-1982 and 1982-1983 academic and fiscal years; plaintiffs still in the bargaining unit are obligated during the pendency of this litigation to similarly deposit subsequent service fees after notice of the MEA and FFA portions; and defendant unions are enjoined from otherwise enforcing the agency shop agreement against plaintiffs during the pendency of this litigation. The amounts deposited with the court are: James P. Lehnert, Elmer S. Junker, James E. Lindsey and John R. Schauble, $455.00 each; Sam C. Peticolas, $215.00. No subsequent deposits have been made because the FFA has not given notice to plaintiffs of the appropriate amounts.

Also to avoid expense and time, the parties have further agreed that the issue of which union expenditures constitutionally are chargeable to plaintiffs shall be tried

only with regard to fiscal year 1981-1982. However, the proportions of the expenditures of defendant unions for various purposes during that year shall not be treated as representative of the proportions of their expenditures during subsequent fiscal years. During the 1981-1982 academic and fiscal year there were an average of approximately 502 full-time equivalent employees, including five of the plaintiffs, in the bargaining unit represented by the FFA.

In practice, the amount of the service fee certified to Ferris by the FFA (in cases where service fee payors have not asserted constitutional objections) has been equivalent to the amount of dues required of members of the FFA. Of course, under the agreement of April 25, 1979, mentioned above, plaintiffs have paid reduced service fees into an interest-bearing escrow account and no payroll deductions from their salaries have been made by Ferris since that time. Pursuant to and in furtherance of the governance documents of the FFA, MEA and the NEA, a substantial portion of the service fees collected from nonunion members of the bargaining unit has been and will continue to be transmitted by the FFA to the MEA and the NEA. In fiscal year 1981-1982 an individual's total dues (or service fee in the case of a nonmember not asserting a timely constitutional objection) amount of $284.00 was disbursed as follows: FFA, $24.80; MEA, $211.20; and NEA, $48.00.

In fiscal year 1981-1982, $10.00 of the MEA's portion of the service fee was placed in a Teacher Assistance Program (TAP) Fund. A major purpose of this TAP Fund was to provide direct financial assistance to teachers who were out of work permanently or temporarily as a result of a strike. After the decision in *Male v. Grand Rapids Education Ass'n*, 98 Mich.App. 742, 295 N.W.2d 918 (1980), *app. denied*, 412 Mich. 851 (1981), became final, the MEA acknowledged that the $10.00 portion of the

service fee allocable to the TAP Fund would additionally be considered nonchargeable for objecting nonunion employees. Union defendants' exhibit G additionally renders nonchargeable a portion of MEA staff time spent administering the TAP Fund.

Plaintiffs are not and have not been members of the FFA. Both before and after filing the instant action, and in their complaint itself, they notified the FFA, MEA and NEA of their objection to the use, even temporarily, of any portion of their service fees for purposes other than negotiating a collective bargaining agreement with the Board of Control, administering that agreement, and adjusting grievances arising under it. The MEA and NEA have spent and will continue to spend portions of service fee monies to support activities other than negotiating a collective bargaining agreement with the Board of Control, administering that contract and adjusting grievances arising under it. Although the parties agree that collective bargaining, contract administration and grievance adjustment occurring at bargaining units other than Ferris can affect collective bargaining, contract administration and grievance adjustment occurring at Ferris, the parties disagree as to whether the plaintiffs constitutionally may be required to support such activities occurring other than at Ferris.

The MEA and NEA have adopted procedures by which dissenting service fee payers, such as plaintiffs, may register their protest against the use of their money for certain purposes. The MEA Policy and Procedures Regarding Objections to Political-Ideological Expenditures, as revised by the MEA Board of Directors on August 6,

1982, is union defendants' exhibit J.[4] The NEA's Political

---

[4]This procedure is central to the issues of this case and will be quoted in full:

POLICY REGARDING OBJECTIONS TO
POLITICAL-IDEOLOGICAL EXPENDITURES

Upon timely objection, no individual required to pay a service fee to a legal association affiliated with the Michigan Education Association (MEA) shall be required, through payment of such a fee, to contribute to the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment and employee representation, which he/she opposes. An individual who, in compliance with the administrative procedures established by the Executive Director of the Michigan Education Association (Executive Director), objects to the use of a portion of his/her service fee to support such an ideological cause or political activity shall be entitled to pay a reduced fee based upon the Executive Director's determination of the percentage of the MEA's annual budget spent for ideological or political purposes unrelated to collective bargaining, contract administration[,] grievance adjustment and employee representation.

OBJECTIONS TO POLITICAL-IDEOLOGICAL
EXPENDITURES
ADMINISTRATIVE PROCEDURES

Section 1

Objections under the policy regarding Objections to Political-Ideological Expenditures ("the policy") shall be made by giving written notice to the Executive Director of the Michigan Education Association. Notice shall be given in writing during the period of September 1 through 15th of each year and shall specify those causes, programs and activities to which the individual objects, or that the individual objects to the use of a portion of her/his service fee for any political activity or ideological cause unrelated to collective bargaining, contract administration, grievance adjustment and employee administration. An objection must be renewed each fiscal year (September 1 to August 31).

Upon receipt of the objection, the Executive Director (or her/his delegate) shall determine first whether the cause, program, or activity to which the individual objects is in fact an ideological cause or political activity within the meaning of the policy. An ideological cause or political activity within the meaning of the policy is one which is unrelated to organizing, collective bargaining, contract administration, grievance adjustment or employee representative [*sic*]. Second, the Executive Director or

Activity Rebate Procedure, as last amended by the NEA

---

her/his delegate, if she/he determines that in fact the cause, program or activity to which the individual objects is an ideological cause or political activity, shall determine the pro rata amount of the individual service fee that has been expended upon or will be expended upon such cause, activity or program. If the individual has objected to a portion of her/his service fee for any political activity or ideological cause, as defined herein, the Executive Director or her/his delegate shall determine (1) the pro rata amount of the individual service fee that has been expended or will be expended on all such causes or activities and (2) the reduced fee accordingly required to be paid by the individual. Upon written request, the Executive Director or her/his delegate shall provide to the individual a copy of the approved budget for the year in question.

Section II

An individual dissatisfied with the determination of the Executive Director may appeal that determination to the Executive Committee of the Board of Directors of the Michigan Education Association. An appeal to the Executive Committee may be taken within 30 days of receipt of the determination of the Executive Director. The appeal shall be taken by giving a written notice to the Executive Director of the individual's desire to appeal her/his determination to the Board of Directors. The individual, along with her/his notice of appeal, may submit to the Executive Committee such written statements and other evidence in support of her/his position as she/he deems necessary. The Executive Committee shall reach a decision on the appeal as soon as practicable, preferably within 60 days for receipt of the appeal. If the individual is dissatisfied with the decision of the Executive Committee, she/he may further appeal by commencing, or otherwise being bound by, appropriate proceedings in the Michigan Employment Relations Commission.

Section III

These procedures apply to amounts remitted to the Michigan Education Association as well as amounts retained by the local association affiliated with the Michigan Education Association. The local associations shall reimburse the Michigan Education Association for any amounts rebated on its behalf under the policy.

Executive Committee on March 27, 1979, is plaintiffs' exhibit 1.[5]

The fiscal year 1981-1982 expenditures of the FFA from dues and service fee monies are set forth in Appendix A. Although the parties disagree as to the chargeability of many of the activities upon which the FFA, MEA and NEA expend service fee monies, they do agree on the general proposition that administrative or overhead expenses should be allocated proportionally between expenses (not including administrative or overhead expen-

---

[5]The NEA has adopted a procedure that is somewhat more complex than that implemented by the MEA. Initially, within 30 days after the NEA budget for a fiscal year is finalized, the Executive Director of the NEA computes a "preliminary political activity rebate" percentage which equals that percentage of NEA dues allocated for "political activity," as that term is defined in Section I.H. of the Exhibit. Copies of the NEA's political activity rebate procedure are posted by all NEA affiliates (i.e., FFA) and published annually in the NEA *Reporter* to give notice to nonmembers. Dissenting nonmembers of the NEA who make a timely objection to the use of any portion of their service fees for "political activity" are notified that the above mentioned percentage of their service fee has been placed in escrow and that the political activity rebate to which he or she is ultimately entitled will be sent to him or her not more than 30 days after the close of the fiscal year in question. The final political activity rebate percentage is computed by the Executive Director by applying the same analysis as above to the actual NEA expenditures for the past fiscal year. Included in the final political activity rebate sent to the dissenting nonmember is an explanation for any differences between the preliminary and final rebate figures, and an explanation of the steps to be taken to challenge the final determination.

Pursuant to the NEA procedure, appeal of the Executive Director's final determination is first taken to the NEA Executive Committee. That decision may be challenged by filing for binding neutral arbitration in Washington, D.C. The expenses of this arbitration are paid by the NEA. The arbitrator must adhere to the NEA's definition of "political activity" and may increase but not decrease the final rebate percentage. Alternatively, Section VII.E. of exhibit 1 provides that the dissenting service fee payor may challenge both the NEA rebate and the state affiliate's (e.g., MEA's) rebate under the appeal procedure adopted by the state affiliate.

ses) found by the court to be chargeable and those found not chargeable. The expenses of the MEA Building and Site Fund during fiscal year 1981-1982 are to be treated as overhead expenses.

B. Adjudicated Facts

1. Ferris Faculty Association-MEA-NEA

In the Fall of 1981, at the beginning of the 1981-1982 fiscal year, the FFA was engaged in the process of negotiating a new collective bargaining agreement with Ferris. Negotiations did not go smoothly and, as reflected in plaintiffs' exhibit 33, a letter from the President of the FFA to the President of the MEA dated October 8, 1981, the FFA was considering going out on strike. In response to this situation, the MEA conducted a "job action investigation" at Ferris.

Warren D. Culver, who in 1981-1982 was the statewide Director of the MEA's UniServ division, testified that the term "job action" is synonomous with "strike" and that the purpose of a job action investigation is to appraise the status of the ongoing negotiations, to determine the willingness of the local's membership to support a strike if necessary, and to put pressure on the employer by making outward preparations for a possible strike. The effectiveness of this third function as a bargaining tool is evidenced by Mr. Culver's testimony that only one out of every seven or eight job action investigations actually culminate in a strike. The remaining six or seven troublesome negotiations are resolved at the bargaining table short of a strike. The court finds Mr. Culver's testimony on this point to be credible.

In conjunction with the job action investigation undertaken at Ferris in the fall of 1981 the FFA, in conjunction with the MEA, established what the union

defendants designate a "crisis center;" plaintiffs call it a "strike headquarters." Once again referring to the credible testimony of Mr. Culver, the court finds that whatever label is attached to this facility, prior to a strike it serves as a meeting place for the local's membership, a base from which tactical activities such as informational picketing can be conducted, and serves to apply additional pressure on the employer by suggesting, whether true or not, that the local is prepared to strike if necessary. While the parties stipulated at the trial that the FFA did not engage in a strike in 1981-1982, Appendix A establishes that the FFA did expend a total of $3821.04 on the crisis center/strike headquarters. Appendix A also reflects that a total of $832.96 was spent for informational picketing, media exposure, signs, posters and buttons. In the negotiations period, these expenses are incurred for the purpose of informing the public of the issues involved in an attempt to bring public pressure to bear on the employer. This type of public opinion and support is very important during contract negotiations involving public sector labor unions such as the FFA given the nature of the employment and the funding available to the college.

The court also finds that $4788.77 was expended by the FFA during 1981-1982 on collective bargaining, contract ratification, negotiations training, and arbitration. Another $150 was spent for rent to hold membership meetings. A total of $1026.84 was used to send FFA representatives to the MEA and NEA Representative Assemblies. The FFA also spent $666.42 on the 13E Coordinating Council. That council is the UniServ unit for the separate bargaining units at Ferris State College and Central Michigan University.

In terms of FFA expenses for 1981-1982 related to political activities, Appendix A reveals that $149.99 was spent on the Preserve Public Education (PPE) Conference. There was much testimony given and many exhibits

received regarding the nature of the PPE program in 1981-1982. The court finds that this program was best summed up in the credible testimony of Warren Culver:

> The "Preserve Public Education Program" was an attempt on the part of the [MEA] to develop meaningful coalitions in the various communities so that we could pass millages, fight ballot issues, and do the kind of things that are absolutely necessary to fund public education, so that we have some reason to be able to continue to exist, bargain the contracts, and gain some benefit for our members.
>
> . . . .
>
> . . . I think that one of the most important things that has to be understood about public employee bargaining is that the amount of money that we get comes from either local property taxes, state taxes and some federal tax. And if we have no way of raising that money, which is all allocated through the legislative process or an election, then we have no way to bargain.
>
> So it is really the front line bargaining of our contracts.

Transcript of Culver Testimony at 4-5. Further, a total of $102.69 was expended for the purposes of lobbying the state legislature and attending an MEA Legislative Dinner. However, no attempt was made to identify the specific issues on which the FFA was lobbying with respect to these expenditures.

Finally, Appendix A states that $2500 was loaned by the FFA to another association in 1981-1982. At trial, it was stipulated that this was a no-interest loan made to the MEA local in the Hisperia School District to support it in a strike. It was further stipulated that this loan was repaid in full the following fiscal year. The remainder of the expenses of the FFA during 1981-1982 were administrative in nature.

2. Michigan Education Association

The MEA is a labor organization which, through 800-900 local affiliates such as the FFA, represents public school employees throughout Michigan. Like most public sector labor unions, it is a highly politicized organization, active in causes both related and unrelated to collective bargaining, contract administration and grievance adjustment. Prior to August 1981, the MEA had been divided into eight divisions. Four of these divisions were administrative in nature: General, Human Resources, Finance, and Internal Operations. The remaining four divisions were UniServ, Public Affairs, Professional Development and Human Rights (PDHR), and Program Development and Support.

The UniServ division was the MEA's main line of contact with the local affiliates. It also accounted for approximately 60% of the MEA's total budget. Basically, UniServ directors (of which there were 97 in 1981-1982) were responsible for delivering the full range of MEA services to the members of the local units. It appears from all the testimony received that these directors spent the majority of their time on activities directly related to collective bargaining, contract administration and grievance adjustment. Further, the UniServ division included the Legal Services program. Through this program, the local associations were provided with legal representation on all employment-related matters. This service was provided on an "as needed" basis by private law firms and in-house counsel. UniServ also employed three negotiations specialists and two organizing specialists who were all supervised by the Director of Organizing and Negotiations.

The Public Affairs division was responsible for the lobbying activities of the MEA and for a majority of its communications and public relations activities. The MEA's

lobbying activities traditionally cover a broad spectrum of issues ranging from pursuing state and local aid for public education to supporting the Equal Rights Amendment. Much of this political activity was undertaken to insure that the state's public schools were adequately funded and the union's members would be able to negotiate beneficial contracts. Of course, any legislative activity in the area of Michigan's Public Employment Relations Act, which affects the MEA's ability to engage in collective bargaining, was closely monitored. Public Affairs also kept abreast of changes in federal laws and regulations which would impact on collective bargaining, contract administration and employee representation. In addition, the *Teacher's Voice*, the primary publication of the MEA reporting on all activities of the organization, was published by this division and distributed to all members of affiliated bargaining units. Finally, the Public Affairs division administered the association's political action committee—MEA-PAC.

The PDHR division engaged four of its eleven professional staffers as research consultants. These research consultants collected data on school finance, collective bargaining and other areas related to public school employment. They then prepared a negotiations data book used by the UniServ staff in bargaining contracts and maintained comprehensive statistics on contract settlements throughout the state. The research consultants also prepared prepackaged surveys for the local associations to use in polling their members to determine the members' interests and concerns going into negotiations. These surveys often concerned the comparability of terms and conditions of employment in surrounding or similar schools. This type of information is highly relevant to the development of bargaining demands. Research services were available to the locals on an as needed basis. In addition to the research consultants, the division also employed seven PDHR consultants. These consultants engaged in three primary areas: professional development

(including instruction, curriculum development and staff development), leadership training, and human rights.

The Program Development and Support division was primarily concerned with conventions and internal governance. The division's budget included the salaries of the MEA Division Directors, the Executive Director, the President and Vice-President, and the administrative assistants to these individuals.

In August 1981, the MEA Board of Directors approved a reorganization of the association's internal structure. That reorganization was completed by the end of the 1981-1982 fiscal year and resulted in the reduction of the number of budget divisions from eight to five. The reorganized budget still had a General category and four main institutional divisions. Uniserv remained the largest single division in the MEA although its size was reduced slightly and some of its smaller departments were transferred. Three new divisions were created: Administrative, Program Services, and Corporate Affairs.

The Administrative division had three primary program areas: the Department of Finance and Membership, the Department of Internal Operations, and the Department of Human Resources. The Program Services division began the 1981-1982 fiscal year with five departments: Government Affairs, Legal Services, PDHR, Organizing and Bargaining, and Membership Services. However, the Board of Directors eliminated Organizing and Bargaining as a separate department during that year; it is unclear whether those functions were then performed by some other department within Program Services or another division. Finally, the Corporate Affairs division was engaged in developing and delivering special services to the membership. Included in this division were the following: the Michigan Educators Financial Services Association (MEFSA) (providing individual economic

benefits and financial services to members), the Michigan Education Association Legal Services Plan (MEALS) (providing free legal services for members), and the Michigan Education Special Services Association (MESSA) (providing various insurance benefits for members).

Considerable testimony was offered concerning the financial and accounting systems utilized by the MEA. Most of this testimony revolved around the bi-annual budget. In the spring of 1980, a budget was approved by the MEA Representative Assembly covering fiscal years 1980-1981 and 1981-1982. However, as a result of a decline in MEA membership, a revised budget for the 1981-1982 fiscal year was developed by the Board of Directors and approved by the fall 1981 Representative Assembly. This revised budget is Union defendants' exhibit A. According to the testimony of Catherine Anderson, Director of Finance at the Michigan Education Data Network Association (MEDNA), a reorganized budget was subsequently prepared for 1981-1982 to reflect the administrative reorganization of the MEA during that year.

With respect to the MEA's revised 1981-1982 budget, the four divisions of an administrative nature had individual budgets of the following amounts: General, $425,629; Human Resources, $255,041; Finance, $632,400; Internal Operations, $1,257,300. In addition, the Building and Site Fund, which the parties stipulated would be treated as an administrative or overhead expense, was budgeted at $494,000 for that year. This results in a total budgeted administrative or overhead expense of $3,064,370. The remaining four divisions responsible for direct (as opposed to administrative) expenses had the following individual budgets: Program Development and Support, 1,551,300; UniServ, 11,453,700; Public Affairs and Communications, 1,373,200; and Professional Development and Human Rights, 973,600. Therefore, direct budgeted expenditures

for 1981-1982 were $15,351,800, and the overall MEA revised budget for that year was $18,416,170.[6]

When the MEA prepared its reduced fee calculations for 1981-1982, it acknowledged that most of its employees engaged in some activity that was arguably nonchargeable. Therefore, the association had its division and department directors estimate the approximate percentage of time that the average person in his or her area historically spent on nonchargeable activity. These time estimates were generally made after consultation with legal counsel, but rarely involved the review of contemporaneous hard data. Indeed, witness after witness testified that it was not and had not been the practice of MEA staffers to record the nature of their daily activities on time sheets. After these estimates of the percentage of nonchargeable time were prepared, a "cushion" was added to increase the effective nonchargeable percentage to cover any error. The final nonchargeable percentage was then applied to the annual dues of MEA members which were computed on the basis of the 1981-1982 revised budget. The results of this calculation are set forth in union defendants' exhibit G. Catherine Anderson testified that the MEA's records for 1981-1982 are insufficient to enable an independent certified public accountant to conduct an audit of union defendants' exhibits G and OOOO. Transcript of Anderson Testimony at 33-34.

At trial, the MEA continued to argue the validity of its final reduced fee calculation by presenting evidence regarding the estimated nonchargeable portion of its 1981-1982 revised budget. Although evidence of actual expenditures for that year, as opposed to budget figures, should have been available to the MEA, the only such

---

[6]This figure excludes the MEA-PAC and TAP Fund which the Union defendants concede are completely nonchargeable.

evidence that was introduced was the schedule of expenses contained on the last page of plaintiffs' exhibit 613. Moreover, this schedule of expenses was formatted not on the revised budget for that year but on the *reorganized* budget.

Ms. Anderson also testified that actual total expenditures for any given year generally vary less than 2% from the total budgeted amount. However, she conceded that individual line items may vary by more than 2%. The court finds that Ms. Anderson's concession is an understatement. By reference to the actual versus budgeted figures for 1978-1979 and 1981-1982 listed in union defendants' exhibit A and plaintiffs' exhibit 613 respectively, it is clear that individual line items often vary considerably more than 2%.

The court was not at all aided in its calculation of a chargeable reduced service fee by evidence of estimated nonchargeable percentages of time and activity. Further, aside from the fact that exhibit 613 contains sparse detail of activity expenditures, the difference in the structures between union defendants' exhibits A and G (based on the revised budget) and plaintiffs' exhibit 613 (based on the reorganized budget) made an extrapolation of a reasonably accurate chargeable service fee impossible. For these reasons, I conclude that there are few instances indeed in which the MEA has established the chargeability of discrete actual expenditures.

The procedure by which the MEA implemented the service fee for nonunion objectors in 1981-1982 is set forth at note 4, *supra*. Recently, in the wake of the United States Supreme Court's Opinion in *Chicago Teachers Union v. Hudson*, ___ U.S. ___, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), a new policy and procedure regarding objections to the service fee was implemented. On May 7, the MEA Board of Directors adopted a new policy regarding objections to political-ideological expenditures. Shortly before

that, the Executive Director of the MEA adopted, upon the advice and recommendation of the Director of Legal Services, new administrative procedures to implement this policy. The new policy and procedures are currently in effect and are contained in union defendants' exhibit QQQQ. Due to their importance to the ultimate remedy in this case, they are also set forth in full in the margin.[7]

---

[7]POLICY REGARDING OBJECTIONS TO POLITICAL-IDEOLOGICAL EXPENDITURES

Upon timely objection, no individual required to pay a service fee to a local association affiliated with the Michigan Education Association (MEA) shall be required, through the payment of such a fee, to contribute to the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment and employee representation, which he/she opposes. An Individual who, in compliance with the administrative procedures established by the Executive Director of the Michigan Education Association (Executive Director), objects to the use of a portion of his/her service fee to support such an ideological cause or political activity shall be required to pay a reduced fee based upon a determination of the percentage of the MEA's annual budgeted expenditures necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees.

OBJECTIONS TO POLITICAL-IDEOLOGICAL EXPENDITURES
ADMINISTRATIVE PROCEDURES

Section I

At the beginning of each fiscal year (September 1 to August 31), the Executive Director of the Michigan Education Association or his/her designee shall determine the amount of the MEA's total budgeted expenditures that will be expended on chargeable and nonchargeable activities. The Executive Director or his/her designee shall then calculate the reduced fee that an objector will be required to pay. By November 10 of each year, or as soon thereafter as possible, the Executive Director shall make available to all non-union employees information identifying the MEA's total budgeted expenditures and identifying the chargeable and nonchargeable budgeted expenditures. At the same time, the Executive Director shall make available information identifying the previous year's total budgeted expenditures, the year-end financial statements verifying the actual expenditures, and an

3. National Education Association

The NEA is a national voluntary labor organization of public school employees. The MEA is a state affiliate and the FFA is a local affiliate of the NEA. Through its various state and local affiliates, the NEA represents approximately 12,000 bargaining units nationwide. Like the MEA, the NEA is a highly politicized organization which engages in a variety of activities aimed primarily at promoting public education and public school employee

---

analysis of the previous year's reduced fee calculation using the verified actual expenditures.

Section II

Objections under the policy regarding Objections to Political-Ideological Expenditures ("the policy") shall be made by giving written notice to the Executive Director of the Michigan Education Association. Notice shall be given in writing during the period of September 1 through December 1 of each year and shall specify that the individual rejects the reduced fee calculation. An objection must be renewed each fiscal year.

Upon receipt of the written notice rejecting the reduced fee calculation, the Executive Director (or his/her designee) shall review the reasons, if any are given, for the rejection. The Executive Director will have 10 days to respond to the objector. If the Executive Director does not respond within the 10-day period it will be assumed that no merit was found in the individual's objection and the objector may proceed to the next step of this procedure.

Section III

An individual dissatisfied with the determination of the Executive Director shall appeal that determination by filing an Unfair Labor Practice Charge, or otherwise being bound by, appropriate proceedings in the Michigan Employment Relations Commission. If an unfair labor practice charge has not been filed by December 15, the union shall seek a reasonably prompt determination of the appropriate reduced fee by the Michigan Employment Relations Commission.

Section IV

Pending a decision of the Michigan Employment Relations Commission, the objector may be required to pay 100% of the reduced fee into an escrow account identified by the Executive Director.

welfare, in addition to improving the bargaining ability and position of its members and affiliates. The NEA is governed by the National Education Association Representative Assembly, Board of Directors and Executive Committee. Its actual expenses for 1981-1982 totaled $70,420,142.

At the outset, the court will make some findings regarding plaintiffs' claim that the NEA has waived its right to any and all service fees from these individual plaintiffs. It appears that in 1981, the NEA made some settlement offers to plaintiffs whereby the NEA would refund service fees collected and waive its right to some future fees in an attempt to avoid the prohibitively high expense of the instant litigation. Plaintiff Speerman, who had already retired at that time, accepted the NEA's offer of refund but the remaining plaintiffs did not. The parties could not agree on exactly what future fees were subject to the waiver and the settlement and release of the NEA did not transpire. Furthermore, plaintiffs were unwilling to forego their claim against the NEA for injunctive relief regarding its rebate procedures. In 1982, the court denied defendants' motion to dismiss for mootness on similar grounds. *Lehnert v. Ferris Faculty Ass'n-MEA-NEA*, 556 F.Supp. 309 (W.D.Mich.1982). Finally, on October 22, 1984, the plaintiffs and the NEA stipulated that the NEA would refund all pre-1981-1982 service fees in exchange for limited discovery and litigation solely as to the 1981-1982 school year. The court finds that this stipulation would have been meaningless had the parties thought that the NEA had waived its right to all service fees. Since plaintiffs offer no other evidence suggesting that the NEA has made such a waiver, the court expressly finds that the NEA has not waived its right to collect service fees from plaintiffs for any fiscal years from 1981-1982 forward.

From the evidence received at trial, the court finds that the NEA can be broken down functionally into 12

areas. Eight of those areas involve so-called direct expenditures: Affiliate Services, Communications, Government Relations, Human and Civil Rights, Instruction and Professional Development, Legal Services, Political Affairs, and Research. The remaining four areas, Administration, Business and Finance, Data Processing, and Governance, can be characterized as administrative or overhead. A brief description of the role of those areas and their actual expenditures in 1981-1982 is taken from union defendants' exhibits EEEE, FFFF and GGGG.

The Affiliate Services area operates to deliver NEA programs to NEA affiliates in the field. This is accomplished through six NEA Regional Offices. The total 1981-1982 Affiliate Services expenditures of $27,498,475 are further broken down into the following eight general areas: membership promotion and recruitment, $2,042,482; leadership training, $1,177,354; staff training, $1,010,138; coordination of services to affiliates, $3,529,672; bargaining and negotiation support, $1,171,938; field support for legislation and political affairs, $778,792; organizing, $4,615,088; and UniServ, $13,173,011.

The mission of the Communications area is to provide internal and external communications to NEA leaders, members, potential members and the general public. Internal communication was effected primarily through the NEA's various publications. External communication was accomplished through the media. The Communications area expended a total of $7,904,237 in 1981-1982, $5,846,892 internally and $2,057,344 externally.

Through the Government Relations area in 1981-1982, the NEA lobbied Congress on various issues related to employment and public education, monitored the activities of the Reagan Administration and several federal agencies, coordinated its efforts regarding passage of the Equal Rights Amendment, and communicated pertinent informa-

tion to the state and local affiliates. The Governmental Relations area spent $1,652,718 on its attempts to achieve federal legislation and $433,435 on monitoring the administration and agencies for a total of $2,086,153.

The Human and Civil Rights area is sometimes referred to as Teacher Rights. The area is responsible for developing and implementing programs to prevent violations of teachers' rights, to protect and defend teachers whose rights have been violated, and to increase the involvement of minorities and women in the NEA. In 1981-1982, the area expended $255,751 on programs and litigation to protect teacher rights, $649,692 to enhance civil rights in education, $474,797 to increase minority involvement, and $234,232 to enhance equal educational opportunity, for a total of $1,614,472.

The Instruction and Professional Development (IPD) area is responsible for assisting affiliates with the development and application of guidelines for licensure, accreditation and continuing education for teachers. It also provides training to teachers in numerous areas of professional and educational interest. With respect to higher education, it assists faculty in implementing guidelines to evaluate governance, tenure and academic freedom. The area's total 1981-1982 expenditures of $2,275,960 were divided as follows: professional excellence, $514,054; organizational excellence through IPD, $856,534; integrity in educational opportunities, $546,743; and national recognition for quality education, teaching and critical educational issues, $358,629.

The Legal Services area offers a variety of programs and activities designed to assist and protect members and affiliates in all types of legal matters. The area operates a unified legal services program, a subsistence loan program, offers liability insurance and assists states in establishing

attorney referral programs. Total area expenditures for 1981-1982 were $7,174,718.

The Political Affairs area concentrates primarily on administering NEA-PAC and fostering individual involvement in campaigning and electoral politics. The area spent a total of $1,081,629 in 1981-1982. The NEA has agreed that this figure is nonchargeable.

The final area involving "direct" expenditures is Research. This area is responsible for gathering and analyzing data, developing and conducting surveys, providing consultant and technical services, and training affiliated staff and elected leaders. In 1981-1982, the Research area expended $1,377,730 on the research computer network, $284,814 on collective bargaining/benefits services, $320,771 on information services, $1,024,908 on surveys, and $548,695 on studies/special projects, for a total of $3,556,918.

The four areas responsible for administrative and overhead expenses, Administration, Business and Finance, Data Processing, and Governance, had total 1981-1982 expenditures of $17,227,585. Of particular note was the $1,408,670 spent by Governance on the 1982 NEA Representative Assembly.

As union defendants' exhibit L reflects, the NEA also computed its 1981-1982 political activity rebate by having its departmental area directors estimate the approximate percentage of time that staffers in their area spent on nonchargeable activity. Although certain NEA employees do keep daily time sheets of their activities, it is unclear to what extent this data was reviewed in making the nonchargeable estimates. Further, to a greater degree than the MEA, the NEA introduced into evidence data regarding actual expenditures for the fiscal year 1981-1982, as opposed to a mere budget. *See* union defendants' exhibits

EEEE (financial statement as of August 31, 1982 with auditor's report) and GGGG (1981-1982 program accomplishment report). While the program accomplishment report is the type of hard data necessary in litigation such as this to establish chargeable expenditures, very little relevant interpretive testimony was offered to clarify the individual line items.

II. ANALYSIS AND LEGAL CONCLUSIONS

A. Chargeable Expenditures

1. Applicable Law

In 1973, the Michigan legislature amended its Public Employment Relations Act (PERA) to expressly authorize an agency shop system for union representation of public employees.[8] The constitutionality of the amended Act was

---

[8]In that regard, Mich.Comp.Laws § 423.210 now provides in pertinent part:

> (1) It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9 [§ 423.209]; (b) to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization: Provided, That a public employer shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay; (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: *Provided further, That nothing in this act or any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 [§ 423.211] to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.* . . .
>
> (2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and

challenged in the Michigan courts and ultimately appealed to the United States Supreme Court. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court held that an agency shop clause in a collective bargaining agreement between the Board of Education and the Detroit Federation of Teachers did not violate the first and fourteenth amendment rights of freedom of expression and association of non-union members of the bargaining unit who were required to pay service fees, at least insofar as the service fees were used to finance union expenditures for the purposes of "collective bargaining, contract administration, and grievance adjustment." *Id.* at 225-26, 97 S.Ct. at 1794. The Court also indicated that a service fee payor could not be required to fund union expenditures for political activity or ideological causes not germane to the union's duties as collective bargaining representative. *Id.* at 235-36, 97 S.Ct. at 1799-1800.

The *Abood* decision was not the first time that the Supreme Court had the opportunity to pass on the constitutional implications of union security provisions such as the agency shop. In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed.2d 1112 (1956), the Court held that section 2, Eleventh, of the Railway Labor Act (RLA) as amended, 45 U.S.C. § 152, Eleventh, which authorized railway carriers and labor organizations acting as exclusive representatives of bargaining units to enter

---

effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative. [Emphasis added.]

into union shop agreements,[9] did not violate the first and fifth amendments to the Constitution. The Court acknowledged the congressional intent of eliminating the free rider problem by requiring those who enjoy the benefits of union representation to contribute to the support of the union. 351 U.S. at 231, 76 S.Ct. at 717. Further, the Court stated that such congressional action was a valid exercise of power under the commerce clause given the legitimate governmental interest in industrial peace and stabilized labor-management relations. *Id.* at 233-34, 76 S.Ct. at 718-19.

One question left undecided by the *Hanson* Court—whether the required payment of union dues in a union shop could be used to force support of ideological causes or political candidates, *see id.* at 238, 76 S.Ct. at 721—was decided several years later in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). *Street* also involved a union shop under section 2, Eleventh of the RLA. In that case, the union had expended union funds, over the objection of dissenting union members, in the support of political causes to which plaintiff-dissenters were opposed. The Court held that the union's use of an employee's money, over his objection, "to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the

---

[9]A union shop arrangement, as opposed to an agency shop, allows the employer to hire freely but all employees must join the union within a specified period of time. *See generally Developments in the Law—Public Employment*, 97 Harv.L.Rev. 1611, 1726 n. 1 (1984) [hereinafter cited as *Developments*]. Nevertheless, under federal law, a union shop is the practical equivalent of an agency shop because the requirement of union membership is interpreted as the requirement of payment of fees and dues. *Abood*, 431 U.S. at 217 n. 10, 97 S.Ct. at 1790 n. 10 (citing *NLRB v. General Motors*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670 (1963)).

adjustment of grievances and disputes." *Id.* at 768, 81 S.Ct. at 1800. Construing the RLA in such a way as to avoid constitutional issues, the Court held that the statute did not give the union this power. *Id.* at 768-69, 81 S.Ct. at 1799-1800.

A third case concerning the RLA, *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), described the burden of persuasion in cases where objecting nonmembers challenge the chargeable service fee:

> Since the unions possess the facts and records from which the proportion of [nonchargeable] political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. And no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of [nonchargeable] political activities.

Id. at 122, 83 S.Ct. at 1163-64. This language was quoted with approval in *Abood*, 431 U.S. at 239 n. 40, 97 S.Ct. at 1802 n. 40.

Subsequent to *Abood*, the Supreme Court decided yet another case involving section 2, Eleventh of the RLA. In *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Court went beyond *Hanson, Street, Allen* and *Abood* and actually undertook to define the line between chargeable and nonchargeable union expenditures under the RLA. Applying the test of "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the

duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" *id.* at 448, 104 S.Ct. at 1892, the Court addressed six particular types of union expenditures: conventions, social activities, publications, organizing, litigation, and death benefits. In making this inquiry, however, the Court first construed the applicable provisions of the RLA in an attempt to avoid unnecessary constitutional issues. *See id.* at 444-45, 104 S.Ct. at 1890-91.

With respect to the first two categories of union expenditures, conventions and social activities, the Court held that the RLA allowed the expenditures to be charged to objecting service fee payors. The Court stated that periodic, national union conventions at which union officers are elected and overall union policies, including bargaining goals and priorities, are set, are necessary for the union to "maintain its corporate and associational existence." *Id.* at 448, 104 S.Ct. at 1892. For this reason, the Court held that conventions are necessary in order that the union may carry out its statutory function as exclusive representative, and therefore, the entire cost of such conventions are chargeable under the RLA. *Id.* at 448-49, 104 S.Ct. at 1892-93. As to the .7% of total union expenditures spent on social activities, the Court noted that these functions were formally open to nonmember employees and were otherwise important to the membership because they helped maintain "harmonious working relationships." *Id.* at 449, 104 S.Ct. at 1892-93. Although conceding that social expenditures were not central to the union's statutory function, the Court refused to hold that such *de minimus* expenditures were beyond the scope of the RLA. *Id.* at 449-50, 104 S.Ct. at 1893.

The Court also considered a portion of the amount of money expended by the union on publications sent to all employees—members and nonmembers alike—to be chargeable to objecting nonmembers. Such publications,

the Court observed, are the union's primary means of reporting on its activities and communicating with represented employees on issues of mutual concern. The Court held that the cost of such publications is chargeable under the RLA to the proportional extent that the publications report on chargeable activities. *Id.* at 450-51, 104 S.Ct. at 1893-94. Presumably, this calculation should be made on a column inch basis, *see id.* at 450, 104 S.Ct. at 1893; but absolute precision in the calculation is not required. *Allen*, 373 U.S. at 122, 83 S.Ct. at 1163.

Since the Court found that these three expenditures were chargeable under the RLA, it also had to consider whether charging for the same activities increased the degree of infringement of the first amendment rights of the objecting employees beyond that impingement inherent in the union shop and, if so, whether the additional infringement is adequately justified by the governmental interest in labor peace. As to the expenditures for social activities, the Court held that the only communicative aspect of the compelled subsidy was the fact that such activities were sponsored by the union—a fact that was already taken into consideration in allowing the union shop. Therefore, forcing the nonmember to subsidize such social activities in no way increased the degree of infringement of first amendment rights. *Id.* 466 U.S. at 456, 104 S.Ct. at 1896.

The Court recognized that conventions and publications presented more serious questions of communicative content. However, the small additional infringement of first amendment rights was justified by the legitimate governmental interest. The Court added that "[t]he very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in the use of compelled funds. The furtherance of the common cause leaves some leeway for

the leadership of the group.' " *Id.* (quoting *Abood*, 431 U.S. at 222-223, 97 S.Ct. at 1793).

There was no explanation for the discrepancy in holdings that the union could charge for the entire cost of conventions under the statute and the first amendment, but only for the portion of union publications relating to chargeable activities. It is beyond peradventure that aspects of union conventions are devoted to activities considered nonchargeable under the Court's definition. Nevertheless, Justice Powell's separate Opinion clearly pointed out this anomaly so it cannot be argued that the Court's holding regarding the expenses of the convention was anything less than deliberate. *See id.* at 457, 104 S.Ct. at 1897 (Powell, J., dissenting in part).

The Court held that the union's expenditures for organizing efforts were completely nonchargeable under the RLA. Although organizing efforts outside the bargaining unit arguably are undertaken to make the union stronger and to bolster its bargaining ability, the connection between such efforts and collective bargaining was thought to be too tenuous. *Id.* at 451, 104 S.Ct. at 1893. With respect to intra-unit organizing, the Court stated flatly that "it would be perverse to read [the RLA] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." *Id.* at 452 n. 13, 104 S.Ct. at 1894 n. 13.

In addressing the union's expenses related to litigation, the Court construed the RLA to impose two qualifiers on chargeability. First, it held that only litigation before agencies and in courts that "concerns bargaining unit employees and is normally conducted by the exclusive representative" is chargeable. *Id.* at 453, 104 S.Ct. at 1895. This includes, but is not limited to, litigation incident to bargaining, contract administration, grievance and dispute resolution, fair representation matters and inter-

union jurisdictional disputes. The second qualifier to chargeability under the statute is that litigation expenses must be broken down on a unit-by-unit basis. *Id.* This latter requirement is unique to litigation expenditures in the *Ellis* Opinion. Indeed, the requirement of a unit-by-unit breakdown of chargeable expenditures has never, to my knowledge, even been suggested in any of the Supreme Court's prior (or subsequent) union/agency shop decisions. Nevertheless, the Court offered no explanation of why the RLA required such a cost allocation and no rationale of why this type of allocation was appropriate to litigation expenses and no others.

With respect to the issue of the union's payment of death benefits to designated beneficiaries of deceased employees, the court of appeals in *Ellis* had held that since insurance benefits are a mandatory subject of bargaining, the union's decision to insure its own members rather than seek benefits from the employer was a legitimate tactical decision, "germane to the work of the union within the realm of collective bargaining." 685 F.2d 1065, 1074 (9th Cir.1982). The Supreme Court did not reach the issue because, at the time of the Opinion, the union was no longer the exclusive representative of the unit and the objecting nonmembers were no longer participating in the benefit system. The Court did, however, rule that the objecting nonmembers were not equitably entitled to a refund of their past contributions because they had enjoyed the benefit of insurance coverage. *Id.* at 454-55, 104 S.Ct. at 1895-96.

At least with regard to political or ideological expenditures of the union, there is a fundamental distinction between cases like *Hanson, Street, Allen* and *Ellis* involving private sector employment, and those like *Abood* and the case at bar involving public sector employment. The *Abood* Court recognized that this distinction is not to be found in the nature of the employee or in the work

performed, but rather in the character of the employer. 431 U.S. at 229-30, 97 S.Ct. at 1796-97 (citing Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U.Cin.L.Rev. 669, 670 (1975)). While *Street* and *Allen* appear to have settled the question whether political or ideological expenditures by the union can ever be chargeable to an objecting member of a private sector bargaining unit, the same reasoning does not necessarily apply in the public sector where the legislature and other political bodies are integrally involved in the collective bargaining process or otherwise directly impact on the terms and conditions of employment. *See Developments, supra* note 9, at 1732-33. The *Abood* Court did not rule on this point, but it nevertheless framed the issues:

> There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. The Court held in *Street*, as a matter of statutory construction, that a similar line must be drawn under the Railway Labor Act, but in the public sector the line may be somewhat hazier. The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.

431 U.S. at 236, 97 S.Ct. at 1800 (footnote omitted).

The leading post-*Abood* federal case on political expenditures by public sector unions is *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985). In that case, public employee plaintiffs challenged, *inter alia*, portions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1 *et seq.*, which allowed agency shop arrangements and authorized the use of service fees for

support of certain lobbying activities directly related to collective bargaining, contract administration or the terms and conditions of employment, but not partisan political activities or ideological causes only incidentally related to such functions. *Id.* 34:13A-5.5(b) and (c). Plaintiffs argued that such forced political support violated the first and fourteenth amendments. After a thorough discussion of the Supreme Court's RLA cases and the *Abood* decision, concentrating on the distinctive nature of public sector employment relations, the *Robinson* court concluded:

> So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be financed with representation fees.

741 F.2d at 609. *See also Cumero v. Public Employment Relations Board*, 167 Cal.App.3d 131, 145-46, 213 Cal.Rptr. 326, 336-37 (1985); *cf. Beck v. Communications Workers of America*, 776 F.2d 1187, 1210-11 & n. 31 (4th Cir.1985) (lobbying expenditures not chargeable in private sector union context).

Although the Third Circuit's decision in *Robinson* is not controlling in the instant case, I find the reasoning in that opinion very persuasive. Further, although the New Jersey statute at issue in *Robinson* provided explicitly that certain lobbying expenditures were chargeable by the union, and Michigan's PERA is silent on this issue, I do not think that the two statutes can fairly be distinguished in this respect. It appears that the New Jersey and Michigan legislatures had similar intents when passing their respective amendatory statutes—to foster the roles of exclusive representatives in the public employment sector and to promote labor peace by eliminating, to the greatest

extent possible, the problem of "free riders" in the collective bargaining unit. *Compare Robinson*, 741 F.2d at 609-10 *with* Mich.Comp. Laws § 423.210(2) *and Abood*, 431 U.S. at 224, 97 S.Ct. at 1793 (discussing PERA). Unlike PERA, the New Jersey statute was amended after, and with the benefit of, the Supreme Court's decision in *Abood*. If there is a distinction to be made between the two statutes, it is that PERA sought to make the full equivalent of ordinary union dues chargeable to the service fee payor while the New Jersey statute provided that the service fee could not exceed 85% of ordinary dues. *See* N.J.S.A. 34:13A-5.5(b). Therefore, it cannot be argued that the Michigan legislature did not intend for service fee payors in an agency shop to contribute to the cost of the union's lobbying activities to the extent that the activities are germane to the union's duties as bargaining representative and the compelled contribution is otherwise constitutionally permissible. In accordance with the foregoing discussion, I find that such lobbying expenditures are constitutionally chargeable to public sector service fee payors under PERA.

Another issue in contention is public sector organizing. As I have already discussed, the Supreme Court held in *Ellis* that expenditures related to organizing, both in and out of the bargaining unit, are nonchargeable under the RLA. The union defendants in the case at bar seek to distinguish *Ellis* on three grounds. First, they restate the importance of the distinction between public and private unions, and especially the inability of school employee unions in Michigan to engage in a lawful strike. These defendants argue that the relative strength of a public bargaining unit in this case is more directly connected to their ability to collectively bargain than in the *Ellis*, private sector union context because the threat of an illegal strike will be taken more seriously by the governmental employer if it knows that a greater percentage of the employees will support the strike. Secondly, the union defendants argue

that the majority of the organizing conducted by them in 1981-1982 was aimed at school support personnel—not teachers. In other words, the unions were organizing within the bargaining unit but not attempting to convince objecting nonmember teachers, such as the instant plaintiffs, to become members. *Cf. Ellis,* 466 U.S. at 451-52 & n. 13, 104 S.Ct. at 1893-94 & n. 13. Lastly, the union defendants distinguish the *Ellis* decision on this point because the Court's holding with respect to organizing was made under the RLA, not under the Constitution.

While these defendants' arguments regarding the differences between the organizing undertaken in the case at bar and that considered in *Ellis* are not entirely unpersuasive, this court is not convinced that the differences are so compelling as to justify a contrary conclusion. The *Ellis* Court stated, in unambiguous language, that it considered organizing efforts "aimed toward a stronger union" to have only an "attenuated connection with collective bargaining." *Id.* at 451, 104 S.Ct. at 1894. This court is satisfied that the constitutional standard of *Abood* requires a more direct connection. Accordingly, I hold that the union defendants' expenditures for organizing are not chargeable to the plaintiffs.

The final issue in contention is litigation expenses. As I have already stated, the *Ellis* Court construed the RLA in such a way as to require such expenses to be chargeable to service fee payors only where the litigation was related to the union's duties as exclusive representative *and* where it involved members of the service fee payors' bargaining unit. I fully recognize that the *Ellis* Court engaged in statutory interpretation in an effort to avoid the constitutional issue. By contrast, the constitutional question of the chargeability of public sector litigation expenses is squarely before this court. Though *Ellis* is not binding on this issue, the Supreme Court's statutory rationale ordinarily would be accorded the greatest persuasive weight in

analyzing the constitutional requirements. However, I am deeply troubled by the complete lack of rationale offered for the *Ellis* requirement of a unit-by-unit breakdown. I am also very concerned about the adverse implications of according constitutional significance to this particular statutory requirement and applying the new rule to the facts of the instant case.

The inconsistency of requiring only litigation expenses to be broken down by bargaining unit in determining chargeability is readily apparent. Much if not all litigation that is related to the union's duties as exclusive representative addresses issues of shared concern. *See Developments*, *supra* note 9, at 1731. Furthermore, since unions operate on a cost-sharing basis, extraordinary expenses incurred by any one unit in any given year are spread out over all units represented by the union. This cooperative cross-funding enables the union to effectively represent individual members and units in hard cases that will have an impact on the greater whole while maintaining stable dues levels. Since dues levels are incorporated as benchmarks for service fees in union/agency shop statutes, *see, e.g.*, 45 U.S.C. § 152, Eleventh; Mich.Comp.Laws § 423.210; N.J.S.A. 34:13A-5.5(b), service fees may not exceed ordinary union dues even in a situation where a disproportionately high percentage of the union's litigation expenditures for a given period are directly attributable to a particular bargaining unit. In other words, a unit-by-unit breakdown of litigation expenses, or any other expenditure, in a determination of the chargeable service fee—even assuming such a breakdown were possible or practicable from a cost effectiveness standpoint—would *logically* lead to drastic fluctuations in the amount of the service fee charged to the objecting nonmembers of individual units. Nevertheless, because most union/agency shop statutes tie the amount of the service fee to the amount of ordinary union dues, service fees can never legally exceed dues. Therefore, a unit-by-unit breakdown of chargeable expen-

ditures would only exacerbate the free rider problem and thereby frustrate the governmental interest that the Court has repeatedly recognized lies at the heart of statutes authorizing union/agency shops.

In addition to these general legal problems, imposing a constitutional requirement of a unit-by-unit breakdown of litigation (or any other) expenses would create an unreasonable and unmanageable administrative burden on the instant union defendants. The MEA has hundreds of affiliated local bargaining units; the NEA has thousands. Assuming *arguendo* that these bodies were able to break-out discrete expenses by bargaining unit—an assumption that is not warranted by the facts at trial—I have little doubt that the marginal revenue received from service fee payors would not justify the cost of modifying the existing accounting systems to accommodate the requirement. Thus, from a cost-benefit standpoint, a decree requiring a unit-by-unit breakdown of chargeable litigation expenses would be "likely to infringe the union's right to expend *uniform exactions* under the [agency] shop agreement in support of activities germane to collective bargaining . . . ." *Allen*, 373 U.S. at 122, 83 S.Ct. at 1164 (*cited in Abood*, 431 U.S. at 239 n. 40, 97 S.Ct. at 1802 n. 40.) In my opinion, such an extreme decree is not warranted by the Constitution or by logic under the facts of the case at bar.

2. *Analysis*

(a) Ferris Faculty Association-MEA-NEA

In reference to the stipulated 1981-1982 expenditures of the FFA listed in Appendix A, I conclude that the bargaining related expenses, the expenses associated with contract ratification and the negotiations training workshop, and arbitration fees, totalling $4,788.77, are unquestionably chargeable to plaintiffs. I similarly find that the $1,026.84 expended on the MEA and NEA Representative

Assemblies is fully chargeable under *Ellis*. Plaintiffs seek to distinguish the *Ellis* decision on this point because the instant conventions were those of "affiliated" unions and not the actual exclusive bargaining representative. However, the legal relationship between local bargaining unit representatives such as the FFA and their state and national affiliates such as the MEA and NEA is a matter of statutory interpretation. The Michigan Employment Relations Commission (MERC), the state administrative agency with the primary responsibility for contruing the requirements of PERA, has repeatedly found that "an affiliated bargaining unit is a different entity from a local, independent unit." *In re Bridgeport Spaulding Community Schools*, Nos. C79-J-353 & CU79 J-51, slip op. at 34 (A.L.J. Op. Feb. 24, 1986) (citing cases). Furthermore, the MERC Administrative Law Judge in *Bridgeport Spaulding* explicitly held that since the "union as affiliated is the exclusive representative" under PERA, the objecting service fee payor can be charged for the cost of the MEA and NEA Representative Assemblies under *Ellis*. *Id.* at 40. By the same rationale, the $666.42 spent by the FFA in sending representatives to the 13E coordinating council, where bargaining strategies and representational policies are developed for the UniServ unit composed of the Ferris State College and Central Michigan University bargaining units, is chargeable to plaintiffs.

The FFA lobbying expenditures were divided into three categories. I found that the PPE program was directed at securing funding for public education in Michigan. In a public sector bargaining unit where funding for employment positions, salaries and benefits is conditioned upon legislative appropriations, such lobbying is directly related to the statutory duties of the exclusive representative. *See Abood, supra; Robinson, supra.* Therefore, the $149.99 spent on the PPE Conference is chargeable to plaintiffs. As to the $102.69 expended by the FFA on lobbying the state legislature and the MEA Legislative

Dinner, the union defendants failed to meet their burden of establishing that the nature of the issues concerned were chargeable. While I do not doubt that funding and other chargeable issues were at least partially covered in these two expenditures, the unions have conceded that they also engaged in other ideological lobbying that is not so clearly chargeable under the *Abood/Robinson* rationale. Since the burden remains always with the union defendant to establish chargeability, I must conclude that none of the $102.69 spent on unexplained lobbying is chargeable to the plaintiffs.

With respect to the expenditures related to the contract negotiations difficulties encountered in 1981-1982, including those for the "crisis center/strike headquarters," informational picketing, advertising, and rent for membership meetings, I think the fact that the FFA did not engage in an illegal strike is of paramount importance. The question whether any of these expenditures may have been chargeable had a strike occurred is one that this court need not address. The "crisis center" never became a "strike headquarters" but still served a useful purpose in the negotiations process. The rent paid to hold membership meetings was necessary to keep the employees of the bargaining unit apprised of the progress of the negotiations and to get feedback on the members' demands. Likewise, the expenditures for disbursing information to the public that was favorable to the bargaining unit's position is well within the realm of reasonable and legal bargaining tactics in the public sector labor context. Therefore, I hold that the entire $4,804.00 expended by the FFA for these purposes is chargeable to the plaintiffs.

The final direct expenditure made by the FFA during 1981-1982 was the $2,500.00 no-interest loan made to support an affiliated local bargaining unit in a strike. The parties have stipulated that this loan was repaid in full in a subsequent fiscal year. I conclude that inasmuch as

strikes by public employees are illegal under Michigan law, this expenditure was made in support of an illegal activity, and hence, cannot be charged to the objecting nonmembers of the bargaining unit. I note only as an aside that had the loan proceeds been recouped during the 1981-1982 fiscal year and then re-expended on a chargeable activity, a different issue would have been presented. Since that is not the case, however, I will leave that issue for another court and another day.

In accordance with this discussion, I find that the FFA has established that 81% of its direct expenditures for 1981-1982 are chargeable to the plaintiffs. Pursuant to the aforementioned stipulation, that same percentage will be applied to the local's administrative expenses. In computing the chargeable service fee for the FFA for that year, the ordinary union member's dues amount, $24.80, is multiplied by the percentage of the total expenditures that are considered chargeable, in this case 81%. The resulting service fee to which the FFA is entitled from the plaintiffs for 1981-1982 is $20.09.

(b) Michigan Education Association

The MEA's theory of this case was that it could establish its chargeable service fee by identifying estimated percentages of time spent on admittedly nonchargeable activity, subtracting the resulting percentage from the overall budgeted expenditures for the year in question, and considering the remaining portion budgeted expenditures chargeable to the plaintiffs. The presentation of evidence at trial by the MEA was consistent with this theory. However, after reviewing the applicable Supreme Court decisions on point, I conclude that the evidentiary record created by the MEA in its case in chief is deficient in two respects.

As an initial proposition, it is no longer open to question that in establishing a service fee a union must identify the expenditures that it made in relation to activities that are germane to duties as exclusive representative. *See Chicago Teachers Union v. Hudson*, ___ U.S. ____, 106 S.Ct. 1066, 89 L.Ed.2d 232, 247 (1986). The percentage of the overall union expenditures that the union establishes as chargeable is thus determined and that same percentage is applied to the amount of ordinary union dues, resulting in a constitutionally chargeable service fee. —

It is not a truism, as the union defendants would suggest, that an admission of nonchargeable activity and time estimates is, by implication, competent proof of chargeable activity and time. As the *Hudson* Opinion explained, the first amendment requires that the union adequately disclose the nature of the activities for which it seeks to charge the objecting service fee payor. Since the burden of persuasion on the issue of the percentage of chargeable expenditures remains always with the union, and since the union possesses the facts and records from which this percentage is to be calculated, *see Allen*, 373 U.S. at 122, 83 S.Ct. at 1163, the union cannot shift the burden to the plaintiffs to cull through the unidentified but assumed chargeable activities in search of discrepancies. This type of erroneous burden shifting is not only unfair to service fee payors who object on the grounds of legitimate first amendment rights but also inevitably leads to the unmanageable and unnecessary pretrial discovery and attendant trial difficulties experienced by the parties and the court in the instant case.

The second deficiency in the evidentiary record created by the MEA regarding its service fee for 1981-1982 was with the basis for their calculations. As I have already described, the MEA relied primarily on "budgeted" figures instead of evidence of actual "expend-

itures." The Supreme Court has consistently held, at least since the 1963 *Allen* decision, that it is union expenditures that are in issue. While *Allen* also stated that "absolute precision in the calculation is not, of course, to be expected or required," *id.*, and that admonition has been continually observed, *see Hudson*, 106 S.Ct. at 1076 n. 18, 89 L.Ed.2d at 247 n. 18, the question remains what degree of inaccuracy is tolerable. Under the particular circumstances of this case, I hold that the introduction of budgeted expenditures is not competent proof of actual expenditures.

Although this case was tried in 1986, the proofs at trial related exclusively to the 1981-1982 fiscal year. Therefore, this is not a situation in which the union was prevented by time constraints from marshalling its financial data regarding expenditures. To the extent that the union's then-existing accounting system did not enable it to breakdown chargeable from nonchargeable expenditures, it might still have identified major categories of chargeable expenditures with reasonable precision. By relying primarily on budgeted expenditures, which often vary considerably from actual expenditures when individual line items are compared, the court would be forced to speculate as to the accuracy of individual line items in the hopes that variables would average out in the end. This problem is, of course, exacerbated by the previously described differing budget formats between union defendants' exhibits A and G (based on revised budget) and plaintiffs' exhibit 613 (based on reorganized budget). Such speculation by the court, acting as the finder of fact, is impermissible. While a limited degree of imprecision is tolerable in calculating a service fee, the reliance on budgeted as opposed to actual expenditures under the circumstances of the instant case is too imprecise.

In reference to the actual expenditures set forth in the MEA's schedule of expenses for 1981-1982, exhibit 613, I

find very few items which I can categorize as completely chargeable absent further relevant explanation. Two such expenses are the $212,959 for the MEA Representative Assembly and the $118,216 for the NEA Convention. Both expenditures were incurred by the Program Development and Support division which is classified as a "direct expenditure" division. Both are clearly, chargeable to plaintiffs under *Ellis*.

The MEA's Program Services division, also a "direct expenditure" division, expended a total of $254,092 on the union's primary publication available to all bargaining unit members—the *Teachers' Voice*. Under *Ellis*, this expense is chargeable to the same extent that the publication reports on activity that is chargeable. All issues of Volume 59 of the *Teacher's Voice* for 1981-1982 were admitted into evidence. *See* plaintiffs' composite exhibit 612. Furthermore, plaintiffs' introduced a "marked copy" of a content analysis study which describes the nature of the contents of Volume 59 on a column inch basis. *See* plaintiffs' exhibit 594. I have reviewed both exhibits exhaustively and while I find the format and mathematical computations of exhibit 594 helpful, I have made an independent determination of the chargeable content of exhibit 612. My analysis reveals that 81.6% of Volume 59 of the *Teacher's Voice* relates to chargeable activity (see Appendix B for calculation). Therefore, of the $254,092 expended in 1981-1982 on that publication, 81.6% or $207,339.07 is chargeable to plaintiffs.

Due to the paucity of relevant evidence, I am unable to identify with any acceptable degree of accuracy any further discrete chargeable expenditures of the MEA for 1981-1982. I hasten to add that this should not be taken as an indication that the MEA did not engage in significant activity of a chargeable nature. This holding merely reflects my understanding of the current status of

the law in this area and the union's failure to structure its proofs in accord with that law.

The sum of the three chargeable MEA expenditures identified above is $538,514.07. The total 1981-1982 MEA expenditures for the three "direct expenditure" divisions under the reorganized budget—Program Development and Support, UniServ, and Program Services—was $15,766,674. Therefore, considering the stipulation regarding direct and administrative expenditures, the proven chargeable percentage is 3.4%. The reduced service fee chargeable to plaintiffs in the instant case and for the 1981-1982 fiscal year is 3.4% of the ordinary MEA dues of $211.20, or $7.18.

(c) National Education Association

Like the MEA, the evidentiary presentation of the NEA was geared toward estimating the percentage of nonchargeable time and activities of NEA staffers. In contrast to the MEA, however, at least two exhibits were introduced which described in some detail the actual expenditures of the NEA for 1981-1982, *see* union defendants' exhibit EEEE and GGGG, the latter of which breaks down expenditures by programs or activities performed by the various departments or areas. Thus, while the court's calculation of the NEA's chargeable service fee is not aided by most of the testimony of NEA witnesses or by union defendants' exhibit L, which is a memorandum explaining the NEA's political activity rebate procedure and a compilation of memoranda from the various departmental areas estimating the nonchargeable percentages of time and activity, some discrete program expenditures are described in exhibit GGGG.

Due to the acknowledged partially ideological-political mission of the NEA, the vast majority of the identified program expenditures detailed in GGGG were either for

a mix of chargeable and nonchargeable activity or were not sufficiently explained to determine their nature. Since there was very little testimony from NEA witnesses relating directly to this exhibit, the court has no clear way to break-out the chargeable from the nonchargeable in these mixed or ambiguous expenditures. Nevertheless, there are a few detailed expenditures that are exclusively for chargeable activity. With respect to these particular expenditures identified below, I hold that defendant NEA met its burden of persuasion that the program activity expenditure was properly chargeable.

Under the Affiliate Services area of exhibit GGGG, pp. 6-7, function 5.0 is entitled "Bargaining and Negotiation Support." Bargaining and negotiation expenses are the most easily identified chargeable amounts under any service fee standard. By reference to the columns for program description, "Program Accomplishment" and "Summary," it is clear to me that programs numbered 5.1, 5.2 and 5.3 identify chargeable activities. The total NEA expenditures for these three programs was $785,190. I do not consider the expenditure for program number 5.4 to be chargeable because it was partially in relation to job action situations. As I explained earlier in this opinion, whether certain expenditures for job actions are to be considered chargeable is a determination to be made on the basis of the particular fact situations. Since the total expenditures for program 5.4 was not sufficiently detailed by the NEA, I cannot consider any portion of it chargeable.

Under the Research area, pp. 39-41 of exhibit GGGG, function 2.0 is entitled "Collective Bargaining/Benefits Services." Again by reference to the first three columns, it is clear that programs 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6 identify chargeable activities. Therefore, the entire $284,814 expended on this function is proportionately chargeable to plaintiffs. Also under the Research area,

pp. 43-44, function 5.0 is entitled "Studies/Special Projects." Programs numbered 5.1 and 5.2 relate directly to studies of public school financing, an activity area that this court considers chargeable. Therefore, the $395,801 expended on these two programs in 1981-1982 is proportionately chargeable to plaintiffs.

This short list exhausts the program expenditures in the eight so-called "direct expenditure" departmental areas of the NEA that this court can identify from the face of exhibit GGGG, other relevant exhibits and the sparse relevant testimony, as related exclusively to union activities that are clearly chargeable. The subtotal of the described chargeable program activity expenditures by "direct expenditure" areas is $1,465,805. This figure represents 2.75% of the total expenditure of $53,192,624 by the "direct expenditure" areas. While there are other program activities in the four "administrative expenditure" areas of Administration, Business and Finance, Data Processing, and Governance (*e.g.,* Administration program 1.5, and Governance function 1.0), the parties have stipulated to apply the same percentage of chargeable "direct" expenditures in determining the chargeable percentage for "administrative" expenditures.

In accordance with this discussion, I hold that the NEA has only established that 2.75% of its overall expenditures for 1981-1982 is proportionately chargeable to the plaintiffs. The NEA service fee that plaintiffs are required to pay for that year is 2.75% of the ordinary NEA dues of $48, or $1.32.

B. Constitutionally Required Procedure

1. Applicable Law

Until relatively recently, the law concerning the procedures to be used by unions in determining service

fees in an agency or union shop was in a constant state of flux. The procedural problem is of fundamental importance because of the strong but conflicting public and private interests involved. "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800.

In the early union shop decisions interpreting the requirements of the RLA, the Supreme Court focused on the duty of the dissenting member to object to political uses of his monies and speculated as to appropriate remedies for proven violations. In *Street*, the Court indicated that "dissent is not to be presumed," and at least implied that an objector would have to specify which specific political activities or causes he or she objected to. 367 U.S. at 774-75, 81 S.Ct. at 1802-03. The *Street* Opinion also suggested that an appropriate remedy might be an order to the union to rebate portions of service fees improperly collected and expended. *Id.* at 775, 81 S.Ct. at 1803. However, the Court made clear that since the objecting employees' "grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union shop agreement by the mere collection of funds," an injunction relieving objectors of all money due under the union shop agreement was inappropriate. *Id.* at 771, 81 S.Ct. at 1801.

Two Terms later in *Allen*, the Court clarified its intent that objectors need only state their objection to the expenditure of their service fees for *any* political purpose; "[i]t would be impractical to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects." 373 U.S. at 118, 83 S.Ct. at 1162. The *Allen* Court stressed that the burden of proving

the chargeable percentage rests fairly with the union inasmuch as the union, and not the employee, possesses the relevant facts and records. *Id.* at 122, 83 S.Ct. at 1163. Lastly, in framing relief, the Court suggested that the union reduce future service fees from objectors by the amount of the past rebate and encouraged the union to adopt an "internal union remedy" to handle objections in years to come. *Id.*

Subsequently, in the *Abood* decision, the Court stated that the statutory protections for objectors available under the RLA were also required by the first and fourteenth amendment protections of freedom of speech and association. 431 U.S. at 233-34, 97 S.Ct. at 1798-99. Because the case came to the Court without a properly developed factual record, it had no specific remedy to review. Nevertheless, the court did suggest that a newly adopted internal union procedure involving rebate calculations made in the first instance by the union officials but ultimately subject to an impartial review might make further judicial proceedings unnecessary. *Id.* at 240-42 & nn. 41 and 45, 97 S.Ct. at 1802-03 & n.n. 41 and 45. In a separate opinion, an argument was proffered that "the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 244, 97 S.Ct. at 1804 (Stevens, J., concurring).

In the most recent RLA case, the Court held that a pure rebate scheme, first suggested in *Street*, "reduces but does not eliminate the statutory violation" where a portion of a service fee is used by the union for impermissible purposes. *Ellis*, 466 U.S. at 443-44, 104 S.Ct. at 1889-90. The Court analogized the pure rebate procedure to "an involuntary loan for purposes to which the employee objects." *Id.* at 444, 104 S.Ct. at 1889. The administrative

convenience of such a procedure could not justify the statutory infringement given the availability of alternatives such as the "advance reduction of dues and/or interest bearing escrow accounts, that place only the slightest additional burden, if any, on the union." *Id.*

Finally, in *Chicago Teachers Union v. Hudson*, ___ U.S. ____, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Supreme Court solidified the constitutional requirements for union procedures in an agency shop. At the outset, the Court stated that procedural safeguards are necessary for two reasons:

> First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee—the individual whose first amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.

Id. at ____, 106 S.Ct. at 1074, 89 L.Ed.2d at 244-45 (footnotes omitted). Given the important nature of the objecting employees' first amendment interests, the Court reaffirmed the need to assure that a dissenter's service fee is not used, even temporarily, for objectionable ideological causes not germane to the union's statutory function, and identified three additional constitutional requirements for a union's procedures for the collection of service fees. *Id.* at ____ - ____, 106 S.Ct. at 1075-78, 89 L.Ed.2d at 246-49.

The first additional requirement is that nonmembers must be given adequate information about the basis for the service fee calculation sufficient to enable them to assess the propriety of the calculation prior to the time for objection. The Court indicated that an adequate dis-

closure must identify and presumably justify the *chargeable* expenditures, rather than merely acknowledge nonchargeable expenditures and thereby treat the balance as chargeable by implication. *Id.* at ____ - ____, 106 S.Ct. at 1075-76, 89 L.Ed.2d at 246-47.

The second additional constitutional requirement is that the union procedure must "provide for a reasonably prompt decision by an impartial decisionmaker." *Id.* at ____, 106 S.Ct. at 1076, 89 L.Ed.2d at 247. While the Court acknowledged that as recently as *Abood* it had "suggested the desirability of an internal union remedy," *id.* n. 19, it was highly critical of the internal procedure of the Chicago Teachers' Union because the three steps of that procedure were entirely controlled by the union. *Id.* at ____, 106 S.Ct. at 1077, 89 L.Ed.2d at 248. The Court indicated that swift state judicial review of objections in the first instance was certainly one way to satisfy the constitutional requirement, but not the only way. *Id.* n. 20. A less burdensome method might be "expeditious arbitration . . . so long as the arbitrator's selection did not represent the union's unrestricted choice." *Id.* n. 21.

Finally, the Court addressed the union's self-imposed escrow of 100% of the objectors' service fees. While such an escrow eliminates the danger that a dissenter's funds might be temporarily used for objectional purposes, it alone does not render the procedure constitutional. The union must still provide an adequate explanation for the advance reduction of the service fee *and* provide for a reasonably prompt review by an impartial decisionmaker. *Id.* at ____ - ____, 106 S.Ct. at 1077-78, 89 L.Ed.2d at 248-49. The Court recognized that a compelled 100% escrow would deprive the union of immediate access to some funds to which it was "unquestionably entitled." *Id.* at ____, 106 S.Ct. at 1078, 89 L.Ed.2d at 249. Therefore, the Court stated that if the initial disclosure sufficiently identifies categories of expenditures that are clearly

chargeable, fees proportional to those expenditures would not need to be escrowed. However, it held that both the identified chargeable expenditures and the limited escrow figure itself would have to be verified by an independent audit of a certified public accountant. *Id.* at ____ & n. 23, 106 S.Ct. at 1078 & n. 23, 89 L.Ed.2d at 249 & n. 23. The Court's Opinion did not further explain this verification requirement. I must assume that it did not intend that the union's preliminary figures would have to be justifiable under generally accepted accounting principles. Such a requirement would be extraordinary given the Court's longstanding adherence to the *Allen* admonition that "[a]bsolute precision in the calculation . . . is not, of course, to be expected or required." 373 U.S. at 122, 83 S.Ct. at 1163 (*cited in Hudson*, at ____, 106 S.Ct. at 1076 n. 18, 89 L.Ed.2d at 247 n. 18).

2. Analysis

(a) Michigan Education Association and Ferris Faculty Association-MEA-NEA

The policies and procedures effective in 1982 for challenging the service fee calculations of the MEA and FFA are set forth in footnote 4, *supra*. In hindsight, it appears that these procedures were defective under the newly-announced *Hudson* analysis in many respects. Initially, the procedure offers no assurance that a dissenter's funds will not be temporarily used for an objectionable purpose. Secondly, an adequate disclosure of the basis for the reduced fee calculation was not made by the union prior to the time for objections. Further, after nonmembers requested such information, they were only given a copy of the approved budget for the year in question—this also constitutes inadequate information. Finally, the procedure did not provide a reasonably prompt decision by an impartial decisionmaker. Instead, the objector was forced to proceed through two levels of

internal union review. This review seems pointless in a case where a nonmember objects to the use of his service fee for *any* nongermane ideological or political purpose. Presumably the union has already decided what is and is not germane in computing the reduced fee. The final step of the procedure was "appropriate proceedings" in the Michigan Employment Relations Commission (MERC). However, while the *Hudson* Court stated that swift *judicial* review would suffice, "review" must logically be synonomous with "decision." In the instant case, the MERC Administrative Law Judge did not render her decision on related challenges to the MEA 1981-1982 reduced fee calculation until this year, just months shy of the instant opinion. While the federal court is certainly in no position to cast aspersions on the speed of MERC's decisionmaking process, this cannot be an example of the swift judicial review the Supreme Court had in mind.

I also have my doubts about the sufficiency of the revised MEA policies and procedures adopted this spring in the wake of the *Hudson* decision. *See* note 7, *supra*. First of all, the information disclosure is scheduled to be made by November 10, "or as soon thereafter as possible." Yet objections must be made on or before December 1. In the spirit of *Hudson*, I think it constitutionally required that nonmembers have *at least* two weeks after receipt of "adequate information about the basis for the proportionate share" in which to consider the information and make a reasoned decision whether to object. Furthermore, in order to assure that a dissenter's funds are not temporarily used for objectionable purposes, I hold alternatively that Ferris may not withhold agency funds from nonmembers' checks until after the time for objection has passed *or* that the union must place said funds in an independently controlled, interest bearing escrow account for said time period. As to the adequacy of the information disclosed, I cannot judge what I have not seen. I can

only say that it will have to be a good deal more revealing than the evidence submitted at trial.

Assuming the preceding requirements are satisfied, the union must either deposit 100% of objectors' service fees into an independently controlled, interest bearing escrow account until such time as an impartial decisionmaker has rendered his final decision on the validity of the reduced fee calculation, *or* have their data for its reduced fee calculation and the data on which it bases its limited escrow verified by an independent audit by a certified public accountant. As a practical matter, I assume that such an audit would require some contemporaneous records detailing the activities on which MEA staffers spend their time. I would hope that such record keeping would not be so administratively burdensome as to compel the union to forego the service fees to which it is entitled. Certainly only major or substantial activities need be listed for purposes of satisfying the *Allen* accuracy requirements. In any event, since the union does not, according to the testimony received at trial, currently keep such time records, the 100% escrow option will likely be necessary for the time being.

Further, the court will need some assurance that the procedure provides for a reasonably prompt decision by an impartial decisionmaker. Even assuming that the union could secure MERC review of the reduced fee calculation on its own behalf and in the absence of a charging party, I hold that any decision that is not handed down before the end of the relevant fiscal year or soon thereafter is not "reasonably prompt." For these reasons, the union might be wise to secure an independent arbitrator, neutrally selected from a state-approved list of labor arbitrators. The MERC proceedings could then be more appropriately used in challenges to the final reduced fee amount after the relevant fiscal year when information on final expenditures for that year is available.

Finally, the MEA's revised policy and procedure differs from the original policy and procedure in note 4, *supra*, in that it does not, by its own terms, apply to amounts retained by local affiliates such as the FFA. This may be an oversight, or it may be intentional. If it is intentional, the FFA must promulgate its own policy and procedure for handling objections to the reduced fee calculation that satisfies the constitutional requirements announced in *Hudson*.

(b) National Education Association

The NEA rebate procedure is also deficient under *Hudson* in several respects. This procedure is contained in plaintiffs' exhibit 1 and is discussed in note 5, *supra*. The most obvious flaw is that the method for determining the reduced fee or "rebate" amount is based upon an acknowledgement of nonchargeable, political activity rather than a justification of the chargeable activity and expenditures. If the information disclosed is otherwise adequate, the NEA's procedure for making that disclosure, set forth in § III of exhibit 1, is sufficient to pass constitutional muster. I would again require, however, that the NEA either forego collection of service fees from nonmembers until the objection time has passed or deposit such funds into an independently controlled, interest bearing escrow account for said time.

Furthermore, the NEA procedure does not provide for a reasonably prompt decision on the validity of the reduced fee calculation by an independent decisionmaker. In fact, no challenge is allowed under the procedure until after the end of the relevant fiscal year when the "final political activity rebate" figure is determined based on actual expenditures. As in *Hudson*, even a 100% escrow of the service fee will not justify this delay. The NEA must provide for an opportunity to challenge the advance

reduction of dues, under the preliminary calculation, during the fiscal year in question. Once again, *Hudson* requires that anything short of a 100% escrow during this time must be independently verified by an audit of a certified public accountant.

I also hold that the NEA's requirement that the independent arbitrator be bound by the union's definition of "political activity" contravenes constitutional requirements. The independent decisionmaker must be free to apply differing standards of chargeability as required by current law. The union cannot bind that decisionmaker to its own definition or standards in any way.

Finally, I note that § VII.E. of exhibit 1 provides that a nonmember employee who challenges the reduced fee calculations of both the NEA and a state affiliate such as the MEA may request that both challenges be processed by the state affiliate under its procedure. By the terms of this section, the NEA retains the discretion to affirm or deny such a request. Assuming that the state affiliate's procedure meets the *Hudson* requirements, granting such a request would certainly satisfy the NEA's burden of providing constitutionally sufficient challenging procedures.

C. Remedy

In accordance with the foregoing discussion in part II.A. of this opinion and the relevant findings of fact, I hold that the union defendants are entitled to the following amounts from plaintiffs James P. Lehnert, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas and John R. Schauble, for agency shop service fees for 1981-1982, together with any interest earned on said amounts: FFA, $20.99; MEA, $7.18, NEA, $1.32. Said plaintiffs are entitled to restitution of the remainder of the reduced fee for 1981-1982 that is currently in escrow, in the amount of $186.41, together with any interest earned on said amount.

This judgment applies only to the service fee for the 1981-1982 fiscal year. The parties, however, filed a stipulation with the court on August 1, 1986, which details a mutually acceptable mechanism for determining the service fees due to the unions from plaintiffs for the four fiscal years subsequent to 1981-1982. This mechanism is based on the final chargeable percentages determined by the court in this case. In review, those percentages are: FFA, 81%; MEA, 3.4%; NEA, 2.75%.

In accordance with the foregoing discussion in part II.B. of this opinion and the relevant findings of fact, I hold that the procedures established by the union defendants for calculating the appropriate agency shop service fee for 1981-1982, and the procedures for challenging the calculation, were constitutionally inadequate under the newly announced *Hudson* standard. However, I find that plaintiffs were not damaged by these procedures, either in 1981-1982 or years subsequent, to any greater extent than the amount of the wrongfully assessed service fee.

Plaintiffs are required by law to contribute to the unions an agency shop service fee of whatever amount the unions can legally establish is chargeable. That amount has been determined by the court for 1981-1982 and the parties have stipulated to a method for calculating that amount for the four subsequent fiscal years. The "retroactive injunction" requested by plaintiffs based on the procedural inadequacies would effectively relieve them of their legal obligation to contribute to the support of the recognized exclusive representative. Such a "retroactive injunction" would not, in my opinion, redress the nature of the theoretical injury, to wit: the denial of the plaintiffs' first amendment interests in proper procedures. Therefore, this type of equitable relief would be inappropriate.

To the extent that plaintiffs have been injured, they are entitled to and will receive adequate compensatory damages. Plaintiffs are not entitled to damages for the value or importance of their first amendment interests in proper procedures as a supplement to compensatory damages. *Memphis Community School District v. Stachura*, ___ U.S. ____, ____ - ____, 106 S.Ct. 2537, 2545-46, 91 L.Ed.2d 249, 261-62 (1986).

Of course, plaintiffs are entitled to a prospective injunction restraining the nonunion defendants from deducting any service fees from their paychecks until such time as the union defendants establish that they have adopted procedures that comply with the requirements of *Hudson*. These requirements are adequately explained above. With respect to the MEA and FFA, some amendment of their revised policies and procedures set forth in note 7, *supra*, is probably required. As to the NEA, significant amendment to their procedure contained in plaintiffs' exhibit 1 is required to bring it into compliance with the constitutional standard. As a partial alternative, the NEA may establish by affidavit or otherwise that future objections by plaintiffs will be processed through constitutional procedures adopted by the MEA. The court will retain jurisdiction in this case for the sole purpose of determining if and when the union defendants have adopted constitutional procedures. At that time, the court's injunction will be dissolved.

JUDGMENT ORDER

In accordance with the written opinion filed this date, and for the reasons stated therein;

IT IS HEREBY ORDERED that judgment shall enter in favor of each of the following plaintiffs, James P. Lehnert, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas and John R. Schauble in the amount of $186.41,

together with any interest accrued on this amount. This judgment shall be satisfied out of the escrow account established by the parties.

IT IS FURTHER ORDERED that the union defendants are entitled to the following amounts from each of said plaintiffs in satisfaction of plaintiffs' service fee obligations for the 1981-1982 fiscal year: FFA, $20.09; MEA, $7.18; NEA, $1.32, together with any interest accrued on these amounts.

IT IS FURTHER ORDERED that plaintiffs' service fee obligations for the four fiscal years subsequent to 1981-1982 shall be calculated in accordance with the stipulation filed with the court on August 1, 1986.

IT IS FURTHER ORDERED that the nonunion defendants are enjoined from deducting any future service fees from plaintiffs' salaries until further order of the court.

APPENDIX A

Direct Costs	
Bargaining team salaries	$2,500.00
Bargaining team expenses	249.45
Bargaining team benefits	72.79
Bargaining—secretarial	28.88
Bargaining—miscellaneous	86.79
Contract ratification expenses	112.15
Negotiations training workshop	687.02
Arbitration fees	1,051.69
Crisis Center/Strike Headquarters*	
— rent	2,780.00
— insurance	91.00
— utilities	80.22
— telephone	632.45
— equipment	40.12

APPENDIX A—Continued

Direct Costs	
— petty cash fund	$197.25
Picketing—food	219.05
Picketing—mailing	26.60
Newspaper & radio advertising	446.10
Signs, posters, buttons	141.21
Rent—membership meetings	150.00
Loan to another association	2,500.00
Lobbying state legislature	55.89
MEA legislative dinner	46.80
Preserve Public Education Conference	149.99
13E Coordinating Council	666.42
MEA Representative Assembly	490.45
NEA Representative Assembly	536.39
Sub-total	14,038.71
Administrative	
Computer	4,137.15
Supplies	43.34
Mailing Permit	69.97
Executive Board expenses	44.46
Photocopying	3.60
Sub-total	4,298.52
Total FFA Expenditures 1981-1982	$18,337.23

*Plaintiffs and defendant unions disagree as to the use of this headquarters. Plaintiffs maintain that it was used to prepare for a possible strike, but defendant unions contend that it was a "Crisis Center."

APPENDIX B

Analysis Summary of Teachers' Voice
Volume 59

Category	Column Inches Total	Column Inches Chargeable
Collective Bargaining	779	779
Lobbying	1895.5	1816
Electoral Politics	1167	847.5
Ideological	508.5	0
Public Relations	405	405
Litigation	97	79
Strikes	143.5	0
Administrative	637.5	627
Newsletter Basics	—	proportional
Other Material	1977	1657.5
TOTAL	7610	6211

$$\frac{6211}{7610} = 81.6\%$$

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

August 22, 1988

James P. LEHNERT, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman, Plaintiffs,

v.

The FERRIS FACULTY ASSOCIATION-MEA-NEA, Michigan Education Association, National Education Association of the United States, the Board of Control of Ferris State College, S. Eugene Bychinsky, Robert L. Ewigleben, Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, Defendants.

No. G 78-346 CA1.

United States District Court,
W.D. Michigan, S.D.

Aug. 22, 1988.

OPINION

ENSLEN, District Judge.

On August 25, 1986, I enjoined the above-captioned union defendants from collecting future service fees from plaintiffs until such time as the unions had adopted constitutionally adequate service fee collection procedures. *See Lehnert v. Faculty Association-MEA-NEA*, 643 F.Supp. 1306 (W.D.Mich.1986). I retained jurisdiction "for the sole purpose of determining if and when the union defendants have adopted constitutional procedures." *Id.* at 1335. The matter is presently before me on defendant unions' motion for approval of new service-fee collection procedures and for dissolution of the injunction against the

deduction of fees from the wages of plaintiff nonunion public employees pursuant to the Court's limited retention of jurisdiction.

In September 1987, the union defendants moved for approval of their service fee collection procedures. Union defendants have modeled their collection procedures after collection procedures which were approved in *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir.1987) and *Lowary v. Lexington Board of Education*, 704 F.Supp. 1456 (N.D.Ohio 1988).

I note that this case has now been pending for a decade. Still, always optimistic of discovering and exploiting unexplored avenues of "getting to yes" with the least discord, I ordered a settlement conference to be held with U.S. Magistrate Doyle A. Rowland on April 5, 1988. As a result of the conference, a number of outstanding issues were consolidated and some agreement on certain issues was reached. Counsel for union defendants agreed to make certain modifications to its already thrice-revised procedures in order to satisfy some of the objections of the plaintiff as as well as those of the "non-union" defendants.[1]

Magistrate Rowland directed the union defendants to file "new" procedures with the Court on or before April 18, 1988, which would incorporate the aforementioned modifications, and to file a new brief in support of those revised procedures. I have reviewed the revised procedures (*see* Objections to Political Ideological Expendi-

---

[1]Here the so-called non-union defendants include Ferris State University, the Board of Control of Ferris State University, and the individual university officers. I have considered the nonunion defendants suggestions in making my rulings, but it does not appear that these "non-union" defendants have standing to object to the union defendants' motion for approval within the context of the issues raised and litigated by plaintiffs in this case.

tures/Administrative Procedures attached to April 18, 1988 Affidavit of Beverly J. Wolkow) as well as the briefs and supporting documentation submitted by all the parties. I note that the union defendants have actually filed two proposed procedures: one governing the collection of agency fees during the 1987-88 and 1988-89 fiscal years and one covering the collection of agency fees in 1989-90 and subsequent years. The two procedures are essentially identical. Accordingly, I see no need to analyze them separately.

Also pending is plaintiffs' related motion to compel discovery and to continue proceedings. That motion was filed by plaintiffs in response to the union defendants' motion for approval of revised procedures for collection of service fees.

Discussion

Addressing the later motion first, I find it unnecessary to review the actual underlying source documents in order to pass upon the validity of the proposed service fee procedures. I note that neither *Andrews*, *supra*, nor *Lowary*, *supra*, found it necessary to examine the actual financial reports, audit verifications, work papers, the forms and instructions to professional staff, or the internal workings of the unions' accounts payable and general ledger system—the discovery of which plaintiffs seek in their motion to compel. Moreover, following the remand in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987), Magistrate Carr has recently denied the *Tierney* plaintiffs' request to take additional discovery prior to the court's review and final approval of the parties' proposed revisions to defendants' plan. Magistrate Carr found that such an action would be "broader and more intrusive . . . [than] it should or can be under *Tierney*." *Tierney v. City of Toledo*, 123 F.R.D. 235 (D.C.Ohio 1988). I find Magistrate Carr's reasoning with respect to the discovery issue

persuasive and also find many of his comments applicable here.

> The role of this Court [under *Tierney*] is, therefore, to be more passive than active; at most it is to provide oversight at this initial stage of review and approval, and to refrain from and resist any tendency toward direct involvement in regulating the plan's implementation. *Its function is to approve the structure, not supervise the plan's operation.*
>
> The request to take discovery at this preliminary stage and the possibility that that request, if granted, will lead to further disputes and opportunities for greater involvement by this Court raise the prospect for ever-increasing participation by the Court in the day-to-day, issue-to-issue operational activities as the plan is implemented. Such involvement by the court is contrary to the role projected by the Sixth Circuit in *Tierney*. As important, it would be contrary to the fundamental policy that *courts are to be at most minimally involved in labor disputes, and that extra-judicial means of dispute resolution—including primarily arbitration—are preferred.*

Tierney v. City of Toledo, 123 F.R.D. at 236 (emphasis added).

I simply find it unnecessary and improper to review the source documents requested by plaintiffs in order to determine whether union defendants' revised procedures satisfy the constitutional requirements of *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). Accordingly, I will deny plaintiffs' motion to compel.

The union's pending motion asks this Court to exercise its well established discretionary power, codified in Rule 60(b)(5) of the Federal Rules of Civil Procedure, to modify or vacate an equitable decree "if the circumstances, whether of law or fact, obtaining at the time of its issuance

have changed, or new ones have since arisen." *Evans v. Buchanan*, 512 F.Supp. 839, 849 (D.Del.1981) (footnote omitted) (quoting *System Federation v. Wright*, 364 U.S. 642, 647, 81 S.Ct. 368, 371, 5 L.Ed.2d 349 (1961)); *see* 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 60.18[8] (2d ed. 1985). Because the union defendants assert only changed factual circumstances, that is, new service fee procedures, defendants bear the burden of proof. *Stewart v. General Motors*, 756 F.2d 1285, 1291 (7th Cir.1985).

Plaintiffs argue that the union defendants have claimed the requisite "new facts" by affidavit only and that plaintiffs have submitted affidavits or have otherwise set forth facts showing that there is a genuine issue for trial. *See* Federal Rules of Civil Procedure 56(c)(e). The gravamen of plaintiffs' argument is that the union defendants must demonstrate that they have provided all of the first amendment safeguards which are required by *Hudson*, and that if plaintiffs cannot controvert defendants' factual claims without discovery, then proceedings should continue in order to permit further discovery. Plaintiffs argue further that although in some respects the defendants' proposed scheme is deficient on its face, in other respects the sufficiency of the scheme cannot be determined without discovery and an evidentiary hearing.

The Supreme Court has clearly stated that:

> the constitutional requirements for the Union's collection of agency fees include [1] an adequate explanation of the basis for the fee, [2] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and [3] an escrow for the amounts reasonably in dispute while such challenges are pending.

Hudson, 475 U.S. at 310, 106 S.Ct. at 1078. Further, it is clear that a procedure which meets only part of those

requirements is constitutionally inadequate. *Id. See also Damiano v. Matish*, 830 F.2d 1363, 1370-72 (6th Cir.1987).

The Information Provided by the Union's Procedures

The union's procedures provide that by November 30, 1988, the Executive Director of the MEA or a designee shall determine the reduced agency fee for both the 1987-88 and 1988-89 fiscal years, based on expenditures during the 1987-88 fiscal year. The actual reduced fee which is assessed will include a five dollar reduction from the amount calculated (based upon 1987-88 fiscal year expenditures) to provide an additional cushion for disputed chargeable costs.

The procedures indicate that nonmembers will receive a list of expenditures made by the NEA and MEA, by major category, verified by an independent auditor. The information will indicate whether the major category of expense, or a particular portion of that category, is chargeable to objectors. In addition, a list of expenditures of local associations certified by a local association officer will be provided. Nonmembers will also receive an explanation of the method used to calculate the reduced fee and a copy of the procedure. The independent auditor will verify the amount of expenditures that were made in both chargeable and nonchargeable areas. It is clear that under the union's procedures, the auditor will not make the legal determination of which expenditures are chargeable or nonchargeable, but rather will only verify that the expenditures were actually made in the categories determined by the union defendants to be chargeable or nonchargeable. The union defendants' determination of chargeable and nonchargeable categories will be subject to review by the independent decision maker.

Plaintiffs argue that in order for a nonmember to make an "intelligent and informed objection" to the use of

his service fees, the auditor should verify whether there are established legal criteria and contemporaneous hard data which show the purpose of expenditures, and which reasonably justify the union's allocation. Further, plaintiffs assert that where such "legal criteria" and "contemporaneous hard data" are absent, the auditor should ensure that that fact is disclosed to nonmembers. Plaintiffs argue further that if an auditor merely accepts at "face value" the union's definition of chargeable costs and its method of allocating costs as chargeable or nonchargeable, little reliability is added to the union's calculation and that the auditor's "blind approval" is likely to mislead employees into not objecting.

I note that the Sixth Circuit is currently considering the issue of whether a number of activities of the union defendants are properly considered to be chargeable or nonchargeable expenditures. Moreover, additional case law developments may again change the complexion of the "gray area" categories. I do not believe the law requires or should require me to review, clarify and approve each document which relates to these categories and which information may, in turn, be sent to nonmembers.

The plaintiffs read *Tierney* to require that an independent certified public accountant make a "legal" as well as an accounting decision. Such a reading would essentially provide objecting plaintiffs with two passes at the alleged "bad spots" in the proffered apple. Plaintiffs' approach would have the auditor function as both "an auditor in the traditional sense and as the independent decision maker as to chargeable expenses." *Andrews*, 829 F.2d at 340. My reading of *Hudson*, *Tierney* and *Damiano* leads me to conclude that all that is required is that an independent auditor, at the audit stage, verify the union's *calculations* and *disbursements* which have been presented to the nonmember. An impartial decision maker will later, if required, make the decision as to whether the chargeability

decision of the union is appropriate. Moreover, my role here is simply to test the proposed procedures against the constitutional requirements of *Hudson*.

The *Hudson* Court said:

> **The union need not provide nonmembers with an exhaustive list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.**

Hudson, 106 S.Ct. 1076 n. 18.

In sum, I do not read *Hudson*'s verification requirement as entailing an initial chargeability analysis. It is clear that under *Hudson*, *Tierney*, and *Damiano*, union procedures can constitutionally allow the union to immediately collect for expenditures which are clearly chargeable and only require the escrowing of those expenditures which fall into a so-called "gray" area: an area which is neither clearly chargeable or clearly nonchargeable. Here the union's procedures provide that the entire reduced agency fee is to be escrowed. Accordingly, the issue of what activities are clearly chargeable and which are merely "gray" areas is not at play in the discussion and analysis of the union procedures presently before me. In *Tierney*, the Sixth Circuit noted that "the range of union expenditures will no doubt be as broad and varied as there are unions. It is not necessary for us to anticipate the categorization of any potential expense, for we see that as an *administrative determination by the independent decision maker*." *Tierney*, 824 F.2d at 1504-1505 (emphasis added).

Accordingly, within the context just discussed and for all the reasons previously stated, I find that the union's procedures concerning the information to be provided nonmembers as well as the role of the auditor under those procedures are consistent with the basic constitutional

requirements set forth in Hudson as glossed in *Tierney* and *Damiano* of an "adequate explanation of the fee."

A related issue concerning the "adequate explanation of the fee" factor, however, is whether the union's procedures which allow it to avoid an independent audit of the local's union expenditures by employing the so-called "local presumption" is constitutional under *Hudson*. The procedures provide that "[t]he percentage of chargeable expenditures by local associations may be presumed by the arbitrator to be whatever percentage is found to be appropriate for chargeable MEA expenditure[, s]ince the local associations spend a significantly larger percentage of their budgets on chargeable expenditures." April 18, 1988 Affidavit of Beverly J. Wolkow, Step III at 4.

The Supreme Court has noted that "absolute precision in the calculation of [the service fee] is not to be expected or required" and that "no decree would be proper which appeared likely to infringe the union's right to expend uniform exactions under the union shop agreement." *Abood v. Detroit Board of Education*, 431 U.S. 209, 239 n. 40, 97 S.Ct. 1782, 1802 n. 40, 52 L.Ed.2d 261 (1977). The defendants argue that the local presumption is a realistic expression of the above-cited "precision principle." Defendants assert that the MEA has some 900 local bargaining units which vary in size, but many of which are quite small. Defendants assert further that whether the units are large or small, local associations spend a larger percentage of their budgets on chargeable expenditures than does the state association. Moreover, defendants assert that to the extent that the local presumption lacks absolute precision, it errs in favor of the nonmembers.

The defendants' assertion has a certain common sense appeal. Further, in support of their argument defendants cite *Robinson v. State of New Jersey*, 547 F.Supp. 1297, 1324 (D.N.J.1982), reversed on other grounds, 741 F.2d

598 (3rd Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985); *Andrews v. Education Association of Cheshire*, 653 F.Supp. 1373 (D.Conn.1987), and *Lowary v. Lexington Local Board of Education*, *supra*.

Plaintiffs argue, however, that not only is there no record evidence which *supports* the premise for the valid use of the "local presumption," an arbitration decision in an Indiana case actually demonstrates that the presumption is based upon a false premise. The deposition of Frank T. Zotto [Ex. 2 at 46-54] establishes that the arbitrator in the Indiana case described therein found that three of the fourteen NEA locals spent a *smaller* percentage of their total expenses on chargeable activities than the state association.

I also note that *Robinson* was decided before *Hudson* and merely found that based on the evidence of record certain local associations were "much less likely to engage in extensive political and lobbying activities than the state and national organizations, and therefore, it is less likely that the moneys they receive from plaintiffs will be used for those purposes." *Robinson*, 547 F.Supp. at 1324. Further, it is true that the district court in *Andrews* found that "the use of the evidentiary presumption that the statewide figure is appropriate for the locals satisfies constitutional requirements, even if in rare instances there may arise situations in which this presumption is incorrect." *Andrews*, 653 F.Supp. at 1378. However, the Second Circuit did not rule on this specific issue as it was not challenged on appeal. Still, the Second Circuit did address the related question of the adequacy of an independent audit. It noted that:

> . . . the district court should not have approached this question with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' first amendment interests . . . the

> procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops regardless of whether the union believes them to be excessively costly. Excessive cost cannot form the basis for allowing the union or the government to avoid *Hudson*'s requirement that the procedures used by the union to allocate bargaining and administrative costs be carefully tailored to minimize the intrusion on the nonmembers' rights.

Andrews, 829 F.2d at 339.

It appears that although it may be more expensive and more problematic from an administrative point of view to show the actual chargeable expenditures of local union expenditures rather than to employ the use of a so-called "local presumption," I do not believe that the use of the presumption complies with *Hudson*'s requirement that detailed financial information concerning all major categories of union expenses—including local union expenses—be supplied to nonmembers. *Cf. Tierney*, 824 F.2d at 1506.

Defendants attempt to save the use of the "local presumption" by using language which provides that the percentage of chargeable expenditures by local and district associations "may be presumed by the arbitrator" to be the same. Defendants indicate that they have used the word "may" to avoid the mandatory "will be presumed by the arbitrator" language which the defendants used in *Lowary*. In *Lowary*, Judge Dowd noted that the impartial decision maker, after hearing the evidence and weighing the objections, may determine that there is no basis *in fact* for the use of the presumption.

The Court believes that the fact that the "local presumption" is rebuttable before an arbitrator does not change its unconstitutional character under *Hudson*. First, the use of the local presumption increases the risk that the reduced fee collection from the objectors would be in excess of what is appropriate. More important, the

presumption impermissibly shifts the burden of persuasion in the arbitration. "The nonmember's burden is simply the obligation to make his objection known." *Hudson*, 475 U.S. at 306, n. 16, 106 S.Ct. at 1076, n. 16. At trial, I clearly required all levels of the union—including the local—to prove chargeable costs from concrete evidence and rejected the use of presumptions, "[s]ince the burden of persuasion on the issue of the percentage of chargeable expenditures remains always with the union, and since the union possesses the facts and records from which this percentage is to be calculated. . . ." *Lehnert*, 643 F.Supp. at 1327. Further, the Sixth Circuit has stated that while it is the dissenting nonunion member's burden to voice his objection, "the burden of showing entitlement to those funds remains with the union, even during arbitration." *Tierney*, 824 F.2d at 1505.

At trial, I also found that "[w]hile a limited degree of imprecision is tolerable in calculating a service fee, the reliance on budgeted as opposed to actual expenditures ... is too imprecise." *Lehnert*, 643 F.Supp. at 1328. Similarly, I find that, like budgeted expenditures, presumed expenditures are not actual expenditures and their use falls short of the precision required under *Hudson*, *Tierney*, and *Damiano*. "[B]ecause First Amendment rights are implicated, the method of calculating service fees for objecting employees . . . must be narrowly drawn" in order to prevent the collection of any amount which represents clearly nonchargeable expenditures." *Damiano*, 830 F.2d at 1369. Here, the union's proposed use of the local presumption is too loosely tailored to satisfy the constitutionally narrow fit required by *Hudson*, *Tierney*, and *Damiano*. The union's proposal that a list of expenditures of local associations be certified by a *local association officer* does not satisfy the requirement that expenditures be verified by an independent auditor.

The Waiver Issue

Another issue still unresolved is the plaintiffs' charge that in the current fiscal year defendant MEA notified nonmembers that they would receive the financial information required under *Hudson* and be able to object *only* upon the condition that they give up their contractual right to payroll deduction and pay the fee in a lump-sum. In order to use payroll deduction, nonmembers apparently had to return a waiver of disclosure which purported to "continue from year to year unless altered in writing prior to the start of each subsequent school year." *See* Affidavits of James E. Lindsey & Vicky Niewonder filed October 13, 1987. Further, the union apparently seeks to continue this waiver practice prospectively in that under the proposed new procedures disclosure will be made "[a]bsent an individual's voluntary, written waiver of the right to receive such information." *See* Defendant's October 30, 1987 Reply Brief in Support of Procedures at 7, n. 3.

Plaintiffs argue that the first amendment is infringed by a requirement that nonmembers either waive their constitutional rights or forego a contractual right to pay fees in installments by payroll deduction. I believe that such a requirement violates the disclosure requirements mandated by *Hudson* and discriminates against dissenters in that service-fee procedures "must not be framed so as to discourage the exercise of [nonmembers'] First Amendment rights by intimidation or the imposition of unrealistic and excessively complex procedural requirements." *Tierney*, 824 F.2d at 1503.

It is clear that first amendment rights may be waived, but such waiver must be "voluntary, knowing, and intelligently made, with full awareness of the legal consequences to be valid." *UAW v. Dana Corp.*, 679 F.2d 634, 645 (6th Cir.1982); *cf. also Sambo's Restaurants v. Ann Arbor*,

663 F.2d 686 (6th Cir.1981). I believe that in order to approve the use of such waivers, those waivers must contain language which includes a clear and full explanation of nonmembers' rights under *Hudson*. At present, it does not appear that the proposed waivers used by the defendants adequately explain the contours of nonmembers first-amendment rights. While I believe that such rights are waivable, the coercive effect of the present waiver procedures appears to function so as to discourage the exercise of nonmembers' first amendment rights.

The Opportunity for Prompt, Impartial Review

Nonmembers are entitled to an opportunity to obtain "a reasonably prompt decision by an impartial decision maker" as to whether the reduced fee includes only constitutionally chargeable costs. *Hudson*, 475 U.S. at 307, 310, 106 S.Ct. at 1076, 1077. Under the unions' proposed procedures the impartial decision maker will be "an arbitrator . . . selected pursuant to the Rules for Impartial Determination of Union Fees of the American Arbitration Association ['AAA']." Further, under those rules "the AAA will select an arbitrator from a special panel of experienced labor Arbitrators." *See* Wolkow Affidavit, Step III & AAA Rule 3.

Hudson noted "that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decision maker, so long as the arbitrator's selection did not represent the union's unrestricted choice." *Hudson*, 475 U.S. at 308 n. 21, 106 S.Ct. at 1077 n. 21. Plaintiffs argue that because the AAA is neutral between unions and employers does not necessarily mean that it is impartial between unions and nonunion employees. Plaintiffs argue further that there are "fairer alternatives" available such as selection by the MEA and representatives of nonmembers' interests or appointment by a government agency, e.g., the Federal Mediation and

Conciliation Service. Plaintiffs conclude that the selection of an arbitrator by the AAA does not satisfy *Hudson*.

Defendants argue that because the Michigan Employment Relations Commission has not yet promulgated rules to ensure timely decisions in agency fee disputes and because several courts have upheld the utilization of arbitrators selected pursuant to the rules of the AAA, defendants have eliminated reference to the possibility of utilizing MERC procedures.

I am not persuaded that plaintiffs' affidavits have raised a material fact with respect to the issue of "actual and/or apparent bias" of the AAA. I note that the proposed rules here specifically provide that the union may not waive oral hearing pursuant to Rule 19 of the AAA Rules. This accommodation is consistent with the Second Circuit's decision in *Andrews* which enjoined the use of the waiver provision contained in the Rules for Impartial Determination of Union Fees of the AAA. The fact that "fairer" procedures may arguably exist is irrelevant provided the proposed procedures meet the constitutional minimum. In sum, I find that the proposed use of the AAA comports with the impartiality requirement set forth in *Hudson*.

Escrow

It appears that defendants have provided a "timetable" for making objections, and that plaintiffs are now in agreement with that "timetable." Even assuming that plaintiffs still maintain their objections set forth in their Brief in Opposition filed April 1, 1987, I find that the "timetable" provisions of the union's revised procedures which allow nonmembers thirty (30) days for filing objections to be constitutionally adequate under *Hudson*. *Cf. Andrews v. Education Ass'n of Chesire*, 653 F.Supp. 1373 (D.Conn.1987).

However, plaintiffs argue that the proposed plan is constitutionally deficient because it provides that a non-member must only pay that portion of the reduced fee "which has accrued" into escrow, and permits collection thereafter of the rest of the fiscal year's fee as it becomes due but does not require escrow of those monies. *See* Wolkow Affidavit at Step II.

I note that this omission appears to be inadvertent in that the Brief in Support of Revised Procedures states that the procedures provide for escrow "of the entire reduced agency fee." *See* Brief in Support of Revised Procedures at 14. Nevertheless, the language of the plan should be modified to clearly indicate this fact before I can approve the plan. In all other respects, I find the proposed escrow procedure to comport with *Hudson*.

The Standard for Chargeable Costs

At trial, I found the NEA's rebate procedure to be deficient under *Hudson* because "the method for determining the reduced fee or 'rebate' amount is based upon an acknowledgement of nonchargeable, political activity rather than a justification of the chargeable activity and expenditures." *Lehnert*, 643 F.Supp. at 1333. It follows then that the standard for calculating the fee must properly define chargeable costs in order for it to pass constitutional muster under *Hudson*.

The definition of chargeable activities which will be applied under the union's procedures by the MEA and the impartial decision maker to calculate and review the fee amount is set forth in attachment A to the Wolkow Affidavit. The Policy Regarding Objections to Political-Ideological Expenditures ("the Policy") states that the reduced fee will be "based upon a determination of the percentage of the MEA's [sic] annual expenditures for the

prior year necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees." Plaintiffs argue that standing by itself that standard would be constitutional but that it is modified by the sentence which precedes it. The preceding sentence defines as nonchargeable "the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment and *employee representation*." (emphasis added). Put differently, under this statement of policy, the logical implication is that any ideological cause or political activity related to employee representation would be chargeable.

The Court finds that the term "employee representation" is unconstitutionally overbroad in this context. It is clear that a union "may collect *only for those expenses affirmatively related to the bargaining agreement* because these constitute the only expenditures that, consistent with the First and Fourteenth Amendment under *Abood* and *Hudson*, the union may collect to prevent nonmembers' 'free-riding.' " *Tierney*, 824 F.2d at 1505 (emphasis added).

Virtually every activity undertaken by unions is in some way "related to *employee representation*" because union members are all employees. Accordingly, without some modification, the term "employee representation," standing alone, appears to be unconstitutionally overbroad.

CONCLUSION

I find that the defendant union's procedures, such as they exist at the present time, do not meet the minimum constitutional standards established under *Hudson* as glossed by *Tierney* and *Damiano*. Accordingly, I must, at this time, deny the defendants' motion for approval of new procedures and continue the existing injunction. My opinion makes clear the relatively few areas in which the

present procedures are constitutionally deficient. I will, of course, entertain a later motion by defendants to dissolve the present injunction provided the revised procedures take into account the deficiencies I have articulated.

APPENDIX D

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

December 9, 1988

James P. LEHNERT, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman, Plaintiffs,

v.

The FERRIS FACULTY ASSOCIATION-MEA-NEA, Michigan Education Association, National Education Association of the United States, The Board of Control of Ferris State College, S. Eugene Bychinsky, Robert D. Ewigleben, Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, Defendants.

No. G78-346 CA1.

United States District Court,
W.D. Michigan, S.D.

Dec. 9, 1988.

OPINION

ENSLEN, District Judge.

Background

On August 25, 1986, I enjoined the above-captioned union defendants[1] from collecting future service fees from

---

[1]Here the so-called non-union defendants include Ferris State University, the Board of Control of Ferris State University, and the individual university officers. I have considered the non-union defendants suggestions in making my rulings, but it does not appear that these "non-union" defendants have standing to object to the union defendants' motion for approval within the context of the issues

plaintiffs until such time as the unions had adopted constitutionally-adequate service fee collection procedures. *See Lehnert v. Faculty Association-MEA-NEA*, 643 F.Supp. 1306 (W.D.Mich.1986). I retained jurisdiction "for the sole purpose of determining if and when the union defendants have adopted constitutional procedures." Id. at 1335. The matter is currently before me once again on union defendants' motion for approval of new service-fee collection procedures and for dissolution of the injunction prohibiting the deduction of fees from the wages of plaintiff non-union public employees.

In September 1987, the union defendants moved for approval of a previous set of service fee collection procedures. Union defendants have modeled their procedures after collection procedures that were approved in *Andrews v. Education Association of Chesire*, 829 F.2d 335 (2d Cir.1987) and *Lowary v. Lexington Board of Education*, 704 F.Supp. 1456 (N.D.Ohio 1988). In April 1988, the parties met with U.S. Magistrate Doyle Rowland, and counsel for the union defendants agreed to make modifications in the procedures and to submit them to this Court. When I then considered the service fee collection procedures during the summer of 1988, this case had been pending for a decade.

On August 22, 1988, the Court issued its opinion and order denying, without prejudice, the union defendants' service fee collection procedures, 707 F.Supp. 1473. In the opinion, the Court identified specific areas that needed revision. The defendants report that they have revised their administrative procedures and policy so as to correct all deficiencies. *See* Affidavit of MEA Executive Director Beverly J. Wolkow, Exhibits A, B, C (September 1, 1988). The MEA Board of Directors approved the revisions to

---

raised and litigated by plaintiffs in this case.

the MEA Policy Regarding Objections to Political/ Ideological Expenditures on September 23, 1988. Affidavit of MEA Executive Director Beverly J. Wolkow, Exhibit A (September 23, 1988).

Discussion

The union defendants filed two sets of procedures—one governing the 1987-88 and 1988-89 fiscal years and one governing the 1989-90 and subsequent years. They are in substance identical and will be discussed as one. A set of revised Procedures and Policy is included in this opinion. *See* Appendix. The Court disapproved of four areas in the September 1987 procedures. I will address each area and then discuss plaintiffs' objections to the revised procedures.

Local Presumption

The Court, in its August 1988 opinion, disapproved of union defendants' use of the local presumption when calculating service fees for objecting employees. While a limited amount of imprecision is tolerable in calculating a service fee, a union should not calculate service fees by using presumed expenditures, as opposed to actual expenditures. "[B]ecause First Amendment rights are implicated, the method of calculating service fees for objecting employees . . . must be narrowly drawn" in order to prevent collection of a clearly nonchargeable expenditure. *Damiano v. Matish*, 830 F.2d 1363, 1369 (6th Cir.1987). The second part of the Court's objection was that use of a local association officer does not satisfy the requirements that expenditures be verified by an independent auditor.

To remedy these problems, defendants revised Step I of the procedures. Now if a local association wants to collect a service fee, it must disclose to non-members its major categories of expenditures, verified by an indepen-

dent auditor. The relevant language in Step I, Part (2) now reads:

> In those instances where a local association service fee is collected, *a list of the local association's major categories of expenditures verified by an independent auditor* and an identification of whether the major category of expense, or a particular portion thereof, is chargeable to objectors *shall be provided.* In the event a court of competent jurisdiction determines that independent audits of local association expenditures are not required, then a list of the local association's major categories of expenditures certified by a local association officer shall be provided. (Emphasis added).

The union defendants also omitted the local presumption language from Step III of the procedures where it had formerly been. Under the revised procedures, it simply says, ". . . the arbitrator shall determine the proportion of the agency fee that is chargeable to non-members under applicable law." The result is if a local association wants to collect a local service fee, it is subject to the same standards applicable to the MEA and NEA.

The language has also been changed to reflect the fact that some local associations may choose not to collect a service fee.

The first sentence of Step I in the procedures now reads:

> By November 30, 1988, or as soon thereafter as possible, the Executive Director of the Michigan Education Association or his or her designee shall determine the amount of the MEA's, NEA's and local associations' (*for those locals collecting a service fee*) total expenditures for the 1987-88 fiscal year that were expended on chargeable and nonchargeable activities. (Emphasis added.)

Where a local association does not collect a local service fee, the information in the procedures will relate to the MEA and the NEA only. While the Court observes that the three proceeding revisions remedy past problem areas, the Court observes that the addition of the following sentence in Step I does not comply with the constitutional standards described in my August 22, 1988 Opinion—in fact, it is directly contrary.

> In the event a court of competent jurisdiction determines that independent audits of local association expenditures are not required, then a list of the local association's major categories of expenditures certified by a local association officer shall be provided.

Employing the so-called "local presumption" fails to comply with the constitutional requirements of *Hudson*, *Tierney*, and *Damiano*.

Waiver Provision

Union defendants were also using a procedure that the Court found violated non-union members' First Amendment rights. In order to use a payroll deduction plan, employees were required to sign a waiver form in which they gave up the right to receive financial information and a full explanation of their rights as nonmembers. This procedure appeared to discourage the nonmembers' access to full and proper information under *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). The Court acknowledged that First Amendment rights may be waived, but stressed that a waiver must be voluntary, knowing, and intelligently made, with full awareness of the legal consequences to be valid. The waivers would only be acceptable, I noted, where the waivers contained a clear and full explanation of the nonmembers' rights under *Hudson*.

According to the union defendants, Step I of the procedures now requires the unions to "provide to *all* non-union employees who are required to pay an agency fee adequate information [as required by the procedures]." In addition, all non-union employees, including all individuals who previously executed a waiver of their rights to receive the information, shall be provided with a copy of the procedures and the information required by the procedures. Affidavit of Beverly J. Wolkow, at 2 (September 1, 1988). The unions have also agreed to disregard the former waivers and consider them without force and effect. Defendant's Brief in Support of Motion to Dissolve Injunction, at 5. Moreover, according to the defendants, any future attempt to secure a waiver shall conform to the standards set forth in the Court's August 1988 opinion.

Escrow

The Court stated in its August 1988 opinion that the language in the procedures should be changed to clearly indicate that, pending a decision by the impartial decision-maker, all payments of the non-member's reduced fee must be paid directly into escrow. In all other respects, I found the proposed escrow procedure to comport with the mandates of *Hudson*. In response to the Court's directive, the union defendants have added the following language to Step II of the procedures:

> All such payments required of an objecting non-member by these procedures shall be paid into the First of America-Central escrow account and shall remain in said account until such time as the arbitrator has issued his or her decision on the proportion of the agency fee that is chargeable to non-members. Thereafter all such funds in the escrow account shall be disbursed in conformity with these procedures.

With this addition, the union defendants clearly establish that all payments required under the procedures will be

paid into escrow and remain there until the independent arbitrator renders a decision.

The Standard for Chargeable Costs

At trial, I found the NEA's rebate procedure to be deficient under *Hudson* because "the method for determining the reduced fee or 'rebate' amount is based on an acknowledgement of nonchargeable, political activity rather than a justification of the chargeable activity and expenditures." *Lehnert v. Faculty Ass'n-MEA-NEA*, 643 F.Supp. 1306, 1333 (W.D.Mich.1986). The standard for calculating the fee must therefore properly define chargeable costs in order to pass constitutional muster under *Hudson*.

The definition of chargeable activities that will be applied in these procedures is found in Policy Regarding Objections to Political-Ideological Expenditures.[2] *See* Affidavit of Beverly J. Wolkow, Exhibit C (September 1, 1988). To begin with, the policy statement said that the reduced fee for non-members would be based on the percentage of annual expenditures for the prior year "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representation of the employees." Previously, however, the policy statement defined as nonchargeable "the financial support of an ideological cause or political activity unrelated to collective

---

[2]The first sentence of the policy statement as found in Exhibit C has also been modified in a non-substantive fashion related to the "chargeability" issue. The policy as found in Exhibit C now reads, ". . . no individual required to pay a service fee to the association affiliated with the [MEA]." This change was made because of the changes made to deal with the Court's decision on the local presumption. Under the revised procedures, some local associations may no longer "require" a local service fee although the MEA and NEA service fees will still be collected. Thus, the policy as revised more accurately reflects what may occur when the procedures are implemented.

bargaining, contract administration, grievance adjustment, and *employee representation*." *Id.* (emphasis added). In my August 1988 opinion, I found that the logical implication of this language is that any ideological cause or political activity related to employee representation would be chargeable. The phrase "employee representation," standing alone, appeared to be constitutionally overbroad.

Now the policy language defining nonchargeable reads: "the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment, and *lawfully chargeable employee representation*." *Id.* (emphasis added). While this definition is somewhat circular, it eliminates the implication that any ideological cause or political activity related to employee representation would be chargeable. Moreover, the case law in this area finds rather elusive a precise definition of what is properly chargeable, and therefore, by exclusion, what is nonchargeable. The Sixth Circuit, for example, has said that "the range of union expenditures will no doubt be as broad and varied as there are unions. It is not necessary for us to anticipate the categorization of any potential expense for we see that as an administrative determination by the independent decision-maker." *Tierney v. City of Toledo*, 824 F.2d 1497, 1504-05 (6th Cir.1987) (acknowledging a "gray area" of expenses that may advance neither or both political/ ideological or collective bargaining interests).

In sum, union defendants have revised their policy and procedures in the following ways to reflect the "relatively few" areas the Court specified in its August 22, 1988 opinion. At this time, if a local association seeks to collect a local service fee, it must prove disclosure of its major categories of expenditures verified by an independent auditor. The amount of the service fee for the local, state, and national associations will be determined under applicable law. The procedures and the information required

by the procedures will be provided to *all* non-members, including those who may have formerly signed a waiver of their right to receive information. The defendants will no longer use the former waivers and will treat all former waivers as null and void. The union procedures clearly state that all payments required by the procedures will be paid into escrow pending an independent arbitrator's decision. Finally, the standard for chargeable costs has been modified to clarify that the defendants seek to collect only for lawfully chargeable activities.

The plaintiffs do not object to most of the substantive areas of the revised procedures. They do, however, make a number of requests of the Court. First, the plaintiffs argue that under *Hudson*, a union should not exact a fee from a non-member without first establishing acceptable constitutional procedures. *Hudson*, 475 U.S. at 305, 106 S.Ct. at 1075 (Stevens, J., concurring). They argue that defendants' revisions of policy will not be complete until the MEA Board of Directors adopts the revised policy. That issue is now moot, however, because the MEA Board of Directors did indeed approve the revised policy on September 23, 1988. *See* Affidavit of Beverly J. Wolkow, Exhibit A (September 23, 1988).

The plaintiffs next object to the procedures because Step I states that defendants intend to require nonmembers to pay a service fee for the 1987-88 fiscal year which ended on August 31, 1988. Plaintiffs claim though that in a prior stipulation (February 1, 1988), defendants irrevocably waived any claim to collect service fees for the years prior to the one in which the Court approves these collection procedures.[3] Although I believe this particular objection is contractual, not constitutional, and goes

---

[3]Plaintiffs also point out that their settlement agreement with defendants excepts fiscal year 1981-82. *See* Settlement Agreement, at ¶ 2.

beyond my purposes of this litigation, defendants will apparently not be seeking fees for the 1987-88 fiscal year, thus the issue is moot. *See id.* at ¶ 4.

Plaintiffs also argue that if the Court approves the union defendants' service fee collection procedures, the Court should then require by permanent injunction both the implementation of those procedures and their incorporation into the collective bargaining agreement. Plaintiffs' Brief in Opposition to Approval of Revised Procedures and Dissolution of Injunction, at 5. Plaintiffs cite *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987), for the proposition that the collective bargaining agreement and the procedures must "work together" and that the procedures should be incorporated into the contract.

The collective bargaining agreement and the procedures must certainly function in harmony, yet the Court disagrees that the procedures must by court order be incorporated into the collective bargaining agreement. As defendants suggest, *Tierney* is to the contrary:

> Beyond that, . . . we do not endeavor to allocate which procedural minima or guidelines must be contained in the ordinance and which may be properly incorporated into the TPPA's [procedures]. To the extent the Union adopted [procedure] is in compliance with the ordinance, is workable and constitutionally adequate, we believe that the ordinance itself will probably be wholly satisfactory.

824 F.2d at 1505.

Recall also that I retained jurisdiction in this case "for the sole purpose of determining if and when the union defendants have adopted constitutional procedures." *Lehnert*, 643 F.Supp. at 1335. Then as now I intend to abide by the fundamental policy that courts are to be at most minimally involved in labor disputes. *Tierney*, 824 F.2d at 1502. In any case, plaintiffs' concerns are now

moot because very recently the employer and unions have agreed to incorporate into their bargaining agreement, by reference, the procedures approved by this Court. Affidavit of David L. Thompson, at 1-2, Exhibit A.

CONCLUSION

Now before the Court is a set of revised service fee collection procedures, not the first set of revised procedures I have reviewed. Ever closer to constitutional adequacy, the procedures have but one sentence that falls below the standards of constitutionality as set forth by the Supreme Court's trilogy—*Hudson*, *Tierney*, and *Damiano*. It should come as no surprise to the union defendants that the second sentence in Step I, part (2) is unacceptable. It is contrary to the explicit standards described in my August 22, 1988 opinion, and is also inconsistent with the sentence before it.

Therefore, the Court would approve the current service fee collection procedures with the omission of the second sentence in Step I. Step I, part (2) would then read:

> In those instances where a local association service fee is collected, a list of the local association's major categories of expenditures verified by an independent auditor and an identification of whether the major category of expense, or a particular portion thereof, is chargeable to objectors shall be provided.

If the union defendants submit to the Court, no later than January 5, 1989, an affidavit stating that the current procedures with the omission of the objectionable sentence are acceptable and accurately reflect the administrative procedures of the union defendants, the Court will grant defendants' Motion to Dissolve Injunction and for Approval of Revised Procedures. I will also consider and rule on plaintiffs' Motion for Injunction Pending Appeal at

that time. The nonunion defendants' objections to the revised procedures have been considered and granted to the extent consistent with this opinion.

APPENDIX

[omitted as duplicative of pages 111a-16a, *infra*, except for the sentence noted by the court on page 96a, *supra*]

APPENDIX E

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

January 3, 1989

As Corrected

February 3, 1989

James P. LEHNERT, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman, Plaintiffs,

v.

The FERRIS FACULTY ASSOCIATION—MEA-NEA, Michigan Education Association, National Education Association of the United States, The Board of Control of Ferris State College, S. Eugene Bychinsky, Robert D. Ewigleben, Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, Defendants.

No. G78-346 CA1.

United States District Court,
W.D. Michigan, S.D.

Feb. 3, 1989.

OPINION

ENSLEN, District Judge.

Background

Over two years ago, this Court enjoined the union defendants in this case from collecting future service fees from plaintiffs until the time the unions adopted constitutional standards for fee collection. I retained jurisdiction "for the sole purpose of determining if and when the union defendants have adopted constitutional procedures." *See Lehnert v. Faculty Association—MEA-NEA*, 643 F.Supp. 1306 (W.D.Mich.1986).

After a decade of litigation, and numerous revisions of the policy and procedures, I believe I have reviewed the last revision. Also before me is a motion by plaintiffs for an injunction pending appeal.

An order granting defendant unions' pending motion would be a final judgment dissolving an injunction. Federal Rule of Civil Procedure 62(c) provides that when an appeal is taken from a final judgment dissolving an injunction, "the court in its discretion may . . . restore, or grant an injunction during the pending of the appeal." An injunction pending appeal may be sought before judgment is entered and appeal noticed, if "there is reason to believe that an appeal will be taken. . . ." *Thomas v. City of Evanston*, 636 F.Supp. 587, 590 (N.D.Ill.1986) (quoting 11 C. Wright & A. Miller, *Federal Practice & Procedure* ¶ 2904, at 324 (1973)).

That is the case here. In a December 9, 1988 opinion, 707 F.Supp.. 1482, this Court tentatively approved the union defendants' service fee collection procedures, except for one objectionable sentence. I stated that if the union defendants submitted an affidavit stating that the current procedures—minus the objectional sentence—are acceptable and currently reflect the administrative procedures of the union, the Court would grant the defendants' Motion to Dissolve Injunction and would approve the revised procedures.

The defendants have submitted such an affidavit, and the Court is ready to grant the motion as it declared it would. Before me, however, is a motion that is appropriately decided at the same time—plaintiffs' motion for an injunction pending appeal. The plaintiffs have stated that they will file an appeal to the Sixth Circuit on three issues: First, whether the unions' calculation of the reduced fee must be independently audited. Second, whether this Court should have allowed discovery of and examined the

financial data which the unions propose to send to non-members. Last, whether the Court properly denied discovery on the issue of the impartiality of the American Arbitration Association ("AAA"). Plaintiffs' Brief in Support of Injunction Pending Appeal, at 2 (October 13, 1988).

Therefore, I will consider plaintiffs' motion in anticipation of my impending judgment dissolving the defendants' injunction which has been in effect now for over two years.

Injunction Pending Appeal

In deciding whether to grant an injunction pending appeal, the court must balance the same factors as in evaluating a motion for a preliminary injunction. *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir.1987); *Accident Fund v. Baerwaldt*, 579 F.Supp. 724, 725 (W.D.Mich.1984).

These factors are:

1. Whether the plaintiff has shown a strong or substantial likelihood of success on the merits;

2. Whether the plaintiff has shown irreparable injury;

3. Whether the issuance of a preliminary injunction would cause substantial harm to others; and

4. Whether the public interest would be served by issuing a preliminary injunction.

Forry, Inc. v. Neunodorfer, Inc., 837 F.2d 259, 262 (6th Cir.1988); *Mason County Medical Association v. Knebel*, 563 F.2d 256, 261 (6th Cir.1977).

This type of injunctive relief is an extraordinary remedy best used sparingly. *Roghan v. Block*, 590 F.Supp. 150 (1984).

The Sixth Circuit has cautioned courts that they should not view these factors as prerequisites to relief, but rather as factors to be balanced. *In re DeLorean Motor Co.*, 755 F.2d 1223 (6th Cir.1985). Thus, a court can enter a preliminary injunction if it finds that the plaintiff "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir.1982). "Where the burden of the injunction would weigh as heavily on the defendant as on the plaintiff [however], the plaintiff must make a showing of at least a 'strong probability of success on the merits' before a trial court would be justified in issuing the order." *Frisch's Restaurant, Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1270 (6th Cir.1985). Also, as the strength of showing as to irreparable harm increases, the necessity to show likelihood of success on the merits decreases. *Ardister v. Mansour*, 627 F.Supp. 641, 644 (W.D.Mich.1986).

1. *Likelihood of Prevailing on Appeal.* Plaintiffs argue that their appeal will raise substantial questions, including: first, whether the unions' calculation of the reduced fee must be independently audited to reduce "the risk that the reduced fee collection from the objectors would be in excess of what is appropriate," *Lehnert v. Ferris Faculty Ass'n*, 707 F.Supp. 1473, 1479-80 (W.D.Mich.1988). Second, whether the Court should have allowed discovery of and examined the financial data which the unions plan to send to nonmembers; and third, whether the Court properly denied them discovery on the issue of the impartiality of the American Arbitration Association ("AAA").

Plaintiffs suggest that the above questions have not yet been precisely treated by *Hudson* or its Sixth Circuit progeny, *Tierney* and *Damiano*. *See Chicago Teacher's Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986); *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir.1987). On the first question—the need for an independent audit—I still believe it is unnecessary for a court to pass upon the actual source documents in order to decide on the validity of the service fee procedures. In *Andrews v. Education Association of Chesire*, 829 F.2d 335 (2nd Cir.1987) and *Lowary v. Lexington Board of Education*, 704 F.Supp. 1456 (N.D.Ohio 1988), two models the parties have used in developing valid procedures, neither court found it necessary to shuffle through the unions' financial reports, audit verifications, work papers, instructions to staff, or the accounts payable and general ledger systems.

To allow such discovery and to oversee this closely would be squarely against the doctrine espoused by this Court and others—that courts are to be at most minimally involved in labor disputes. This Court's function is to review the structure of the plan, adjudging whether it meets its constitutional threshold; the Court's function is most definitely not to supervise the day to day operations of the plan. I agree with the reasoning of Magistrate Carr who recently denied a similar discovery request by plaintiffs in the post-remand *Tierney* case, stating that to allow plaintiffs' request would result in judicial action "broader and more intrusive . . . [than] it should or can be under *Tierney*." *Tierney v. City of Toledo*, 123 F.R.D. 235 (N.D.Ohio 1988).[1]

---

[1]As I have previously stressed:

> The role of this Court [under *Tierney*] is, therefore, to be more passive than active; at most it is to provide oversight at this initial stage of review and approval, and to refrain from and

The second question is based upon the plaintiffs' contention that the Court should have allowed discovery and should have actually inspected the financial data which the unions were planning to send to nonmembers. At the time I considered this issue, the plaintiffs argued that in order for a nonmember to make an "intelligent and informed objection" to the use of his service fees, the auditor should verify whether there are established legal criteria and contemporaneous hard data which show the purpose of expenditures, and which reasonably justify the union's allocation. Further, plaintiffs asserted that where such "legal criteria" and "contemporaneous hard data" are absent, the auditor should ensure that that fact is disclosed to nonmembers. Plaintiffs argued further that if an auditor merely accepts at "face value" the union's definition of chargeable costs and its method of allocating costs as chargeable or nonchargeable, little reliability is added to the union's calculation and that the auditor's "blind approval" is likely to mislead employees into not objecting.

---

resist any tendency toward direct involvement in regulating the plan's implementation. . . .

> The request to take discovery at this preliminary stage and the possibility that that request, if granted, will lead to opportunities for greater involvement by this Court raise the prospect for ever-increasing participation by the Court in the day-to-day, issue-to-issue operational activities as the plan is implemented. Such involvement by the court is contrary to the role projected by the Sixth Circuit in *Tierney*. As important, it would be contrary to the fundamental policy that courts are to be at most minimally involved in labor disputes, and that extra-judicial means of dispute resolution—including primarily arbitration—are preferred.

Lehnert v. Ferris Faculty Ass'n—MEA-NEA, 707 F. Supp at 1476 (W.D.Mich.1988) (quoting *Tierney v. City of Toledo*, 123 F.R.D. 235 at 236-37 at 2 (N.D.Ohio 1988)).

I still read *Hudson*, *Tierney*, and *Damiano* as requiring that an independent auditor, at the audit stage, verify the union's calculations and disbursements—but not the chargeability decision—which go to the nonmembers. Plaintiffs' view of *Tierney* would have an independent auditor making a legal as well as an accounting decision. This seems unwise for several reasons. An impartial decision-maker, at a later stage if necessary, will make a decision as to whether the chargeability decision of the union is appropriate. Moreover, if my role in this matter is simply to test the proposed procedures against the constitutional requirements of *Hudson*, the Supreme Court quite clearly stated that:

> The union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.

Hudson, 475 U.S. at 307 n. 18, 106 S.Ct. at 1076 n. 18.

Hudson's verification requirement does not appear to call for an initial chargeability analysis. *Hudson* and its progeny allow the union to immediately collect for clearly chargeable expenditures and only require escrowing of "gray area" expenditures. The union defendants here provide that the entire reduced agency fee may be put in escrow. Thus the issue of what activities are chargeable or merely "gray areas" was not even seriously at issue in this case.

In any case, *Tierney* may best shed light on this issue originally raised by plaintiffs. The Sixth Circuit stressed that the range of union expenditures would be "broad and varied," as are the unions. "It is not necessary for us to anticipate the categorization of any potential expense, for we see that as an administrative determination *by the*

independent decision maker." *Tierney*, 824 F.2d at 1504-505 (emphasis added).

The third, and last, question plaintiffs intend to raise on appeal is the propriety of the Court's decision to disallow discovery on the issue of the impartiality of the American Arbitration Association ("AAA"). On this point, plaintiffs observe that although *Damiano*, 830 F.2d at 1371-72, upheld selection by the AAA of the "impartial decisionmaker" required by *Hudson*, 475 U.S. at 307-08, 106 S.Ct. at 1076-77, it contemplated that parties in other cases could attempt to make a more complete record than was available there. Plaintiffs argue the Court's denial of plaintiffs' requests for discovery on this issue is contrary to the principle that full discovery should be permitted in an action under 42 U.S.C. § 1983. *See Tarleton v. Meharry Medical College*, 717 F.2d 1523, 1535 (6th Cir.1983).

I note that the standard enunciated in *Hudson* requires that nonmembers obtain "a reasonably prompt decision by an impartial decision maker" as to whether the reduced fee consists of only constitutionally chargeable costs. *Hudson*, 475 U.S. at 307, 310, 106 S.Ct. at 1076, 1078. Under the unions' proposed procedures the impartial decision maker will be "an arbitrator . . . selected pursuant to the Rules of Impartial Determination of Union Fees of the [AAA]." Further, under those rules, the AAA will select an arbitrator from a special panel of experienced labor arbitrators.

At the time, plaintiffs argued that because the AAA is neutral between unions and employers does not mean that it is impartial between union and non-union employees. Among the "fairer alternatives" plaintiffs suggested was mutual arbitrator selection by the Michigan Education Association ("MEA") and representatives of nonmembers' interest or appointment by a government agency such as the Federal Mediation and Conciliation Service.

Plaintiffs' affidavits at the time did not raise a material fact regarding the issue of actual or apparent bias of the AAA. I am not convinced—nor was I then—that the standard I should apply is one of "fairer procedures" from the perspective of one of the parties. The standard is whether the procedure meets the constitutional minimum, and the use of the AAA comports with the impartiality requirement set forth in *Hudson*.[2]

It is unlikely in my view that plaintiffs will prevail on the third issue either. As happened in *Damiano*, this Court found the proofs presented by plaintiffs to be insufficient to raise a genuine issue of material fact. Also *Damiano* was clear that courts have been on the whole hesitant to find that "generalized attitudes or opinions would serve to disqualify an individual from serving as an impartial decision maker." *Damiano*, 830 F.2d at 1371. *See also Robinson v. New Jersey*, 806 F.2d 442, 450 (3d Cir.1986). Plaintiffs' argument that *Damiano* contemplated subsequent parties in other cases to develop fuller records than in that case is simply not supported by any language in the case, and is strikingly counterintuitive.

Further, while it is true that cases premised on alleged violations of civil rights ought not to be disposed of at summary judgment before an adequate record is developed, *Tarleton*, 717 F.2d at 1535, some of the underlying reasons for this rule of law are not present in this case. I believe discovery on the impartiality of the AAA is quite unlike the discovery problems civil rights plaintiffs encounter where a claim for relief involves an inquiry into an

---

[2]As I have noted, the proposed rules here specifically prohibit the union from waiving an oral hearing pursuant to Rule 19 of the AAA rules. This is consistent with *Andrews* which enjoined the use of the waiver provision found in the AAA's rule for impartial determination of union fees.

individual defendant's or another party's state of mind.[3] This problem contrasts with discovery on the general allegation that the members of a group on the whole tend to show bias against nonmembers of a union. Further, courts have not hesitated to grant summary judgment in constitutional or civil rights litigation where, as here, the affidavits fail to raise an issue of fact. *See, e.g., Hampton v. Gilmore*, 60 F.R.D. 71 (D.Mo.1973), *aff'd*, 486 F.2d 1407 (8th Cir.1973).

Finally, the general rule is that the regulation of discovery practices under the Federal Rules of Civil Procedure is within the sound discretion of the trial court. Where further discovery is inappropriate due to undue burden, expense, or delay, the trial court's discretion—and its obligation under Rule 1—is to set proper limits. *Id.* Plaintiffs' argument that "full" discovery should have been granted ignores the fact that fullness at its extreme is excess—which the trial court is obliged to prevent.

Therefore, taking account of plaintiffs' objections to my earlier rulings leads me to conclude that the element of "success on the merits" in the motion for injunction pending appeal has not been satisfactorily demonstrated. The plaintiffs show only that the existing body of case law has not specifically and explicitly addressed each detail of the *Hudson* requirements. I see nothing here that relates to a novel or perplexing issue of law likely to be resolved in plaintiffs' favor.

---

[3]For instance, where lawsuits allege abridgement of constitutional rights, questions of motive, knowledge, malice, and other individual state of mind questions are properly decided by the fact-finder and not the court on summary judgment. *See e.g., Slay v. Alabama*, 636 F.2d 1045 (5th Cir.1981); *Eichman v. Indiana Univ. Bd. of Trustees*, 597 F.2d 1104 (7th Cir.1979); *Augenti v. Cappellini*, 84 F.R.D. 73 (M.D.Pa.1979); *Shifrin v. Wilson*, 412 F. Supp. 1282 (D.D.C.1976).

2. *Irreparable Harm*. Nor do I see adequate evidence of irreparable harm. Plaintiffs argue that if this Court erred in any respect in holding that defendant unions' revised procedures are constitutional, it will have incorrectly dissolved the existing injunction, and the deduction of service fees from plaintiffs' wages while an appeal is pending will harm them irreparably. The irreparable harm, according to plaintiffs, comes from the inability to use part of their wages for their own preferred political or ideological causes, and from the "chilling" effect of the "burden of objection," both of which result in loss of First Amendment freedoms. Plaintiffs maintain that such an infringement of First Amendment freedoms cannot be later cured by a refund of money, since the opportunity to speak or support a cause may well have passed.[4]

The Court agrees that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976). *Accord Lehnert v. Ferris Faculty Ass'n*, 556 F.Supp. 316, 319 (W.D.Mich.1983). I simply do not see that at this point the plaintiffs' First Amendment rights are burdened or lost. At this stage of decade-long litigation, I am prepared to dissolve the injunction against defendant unions, because the policy and procedures now comport with constitutional mandates. If I believed the policy and procedures even minimally fell short of constitutionality, I would require further revision. I do not and I conclude that plaintiffs have not produced a showing of irreparable harm.

---

[4]Defendants argue that there is no irreparable harm because plaintiffs' service fees will be escrowed pending appeal. The collection of agency fees, however, even where 100% is escrowed violates the First Amendment if the procedures do not provide for proper information dissemination and a reasonably prompt decision by an impartial decisionmaker.

3. *Harm to Others.* In addressing potential harm to others, plaintiffs posit that if the Court grants the injunction pending appeal and the Court is affirmed, the unions will have experienced some delay in obtaining service fees as a result of the appeal. However, they argue, that will occur even if the Court does not grant an injunction pending appeal, because the unions have agreed to escrow plaintiffs' fees until all appeals of the court's approval of the procedures are exhausted. Plaintiffs' Reply Brief in Opposition to Injunction Pending Appeal, at 9. Plaintiffs suggest that fees not collected while the appeal is pending could be deducted retroactively from plaintiffs' wages once the appeal is resolved or, if they leave the employ of Ferris State College in the interim, could be recovered in a debt suit. Plaintiffs conclude that compared to the irreparable invasion of First Amendment rights that confronts plaintiffs, any harm that the unions could suffer from an injunction pending appeal is insubstantial. "This is a corollary of the high rank held by the First Amendment in the constitutional scale of values. . . ." *Swope v. Lubbers*, 560 F.Supp. 1328 at 1334 (W.D.Mich.1983).[5]

Defendants vigorously challenge plaintiffs' contention that the unions may "suffer *some* harm." Plaintiffs' Reply Brief in Support of Injunction Pending Appeal, at 7 (emphasis added). First, defendants disagree with plain-

---

[5]Plaintiffs also point out that the balance of harms is not changed by the unions' agreement that an injunction pending appeal will apply to all nonmembers required to pay service fees to affiliates of the Michigan Education Association ("MEA"). All nonmembers have the same First Amendment rights as plaintiffs, *see Damiano v. Matish*, 644 F.Supp. 1058, 1059-60 (W.D.Mich.1986), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir.1987), and the potential harm to the unions is still merely monetary. In any event, the number is relatively small. In 1981-82 only about 300 nonmembers statewide were covered by the MEA's agency-shop agreements, Trial Transcript of Testimony of W.D. Culver at 98-99 (Jan. 13, 1986), compared to 76,000 MEA members, Trial Transcript, Vol. I (testimony of P. McNenly), at 77 (Jan. 7, 1986).

tiffs' conclusion that fees not collected while the appeal is pending could be deducted retroactively from plaintiffs' wages once the appeal is resolved. The defendants note that there has not yet been a decision regarding whether a union may attempt to collect service fees for a previous school year, pursuant to the terms of an agency shop clause in a collective bargaining agreement.[6] The uncertainty here makes plaintiffs' pat conclusions less persuasive.

Also, defendants argue that even if such retroactive collection were allowed, there would be substantial harm to the unions trying to collect retroactive service fees for those nonmembers who have left their employment. A debt suit is possible; *see, e.g., White Cloud Educ. Ass'n v. Board of Educ.*, 101 Mich.App. 309, 320-21, 300 N.W.2d 551 (1980), *appeal denied*, 418 Mich. 939, *appeal dismissed sub. nom. Jibson v. White Cloud Educ. Ass'n*, 469 U.S. 875, 105 S.Ct. 236, 83 L.Ed.2d 176 (1984), however, there is likely to be difficulty attempting to locate nonmembers who have left their employment.

4. *Public Interest.* I believe the public interest at this point in time favors denial of the injunction pending appeal. The unions' policy and procedures meet constitutional standards as interpreted by this Court, and in fact, in some instances, go beyond what is constitutionally required.[7] In a careful balancing process, this Court has

---

[6]Defendants also question *White Cloud Educ. Ass'n. v. Board of Educ.*, 101 Mich.App. 309, 300 N.W.2d 551 (1980), cited by plaintiffs for the proposition that retroactive fee deduction or a debt suit are practices by which defendants could surely avoid or decrease any harm incurred from continuing the injunction. Defendants argue that in *White Cloud*, only one judge in a concurring opinion noted that a civil action might be used by a union to collect a service fee.

[7]The proposed service fee procedures, as one example, provide for the escrow of the entire reduced service fee, not just the portion which is reasonably in dispute. *See* Appendix, at Step II, part (4).

continually attempted to preserve the separate policies of protection of First Amendment rights and fairness in preventing free riding. I have considered both parties' requests and objections over a long litigation period, and am satisfied that any valid constitutional concerns of the past no longer exist.

I therefore approve the policy and procedures and will grant defendants' motion to dissolve the injunction. After balancing all four factors, I will also deny plaintiffs' motion for an injunction pending appeal.

[APPENDIX]

1987-88 FISCAL YEAR

AND

1988-89 FISCAL YEAR

OBJECTIONS TO POLITICAL IDEOLOGICAL EXPENDITURES

ADMINISTRATIVE PROCEDURES

Step I

By November 30, 1988, or as soon thereafter as possible, the Executive Director of the Michigan Education Association or his or her designee shall determine the amount of MEA's, NEA's, and local associations' (for those locals collecting a local service fee) total expenditures for the 1987-88 fiscal year that were expended on chargeable and non-chargeable activities. The Executive Director or his or her designee shall then calculate the reduced fee that an objector will be required to pay for the 1987-88 fiscal year and the 1988-89 fiscal year based on expenditures during the 1987-88 fiscal year by the NEA, MEA,

and local associations. The amount of the reduced fee for each year shall be further reduced by an additional Five Dollars ($5) to make allowance for disputed chargeable costs. By November 30, 1988, or as soon thereafter as possible, the Executive Director shall provide to all non-union employees who are required to pay an agency fee adequate information identifying the NEA's, MEA's and local associations' total expenditures for the 1987-88 fiscal year sufficient to enable them to assess the propriety of the service fee calculation. The information provided to non-union employees shall include:

(1) A list of expenditures made by the NEA and MEA, by major category, during the 1987-88 fiscal year verified by an independent auditor and an identification of whether the major category of expense, or a particular portion thereof, is chargeable to objectors;

(2) In those instances where a local association service fee is collected, a list of the local association's major categories of expenditures verified by an independent auditor and an identification of whether the major category of expense, or a particular portion thereof, is chargeable to objectors shall be provided.

(3) The amount of the reduced agency fee;

(4) The method used to calculate the reduced agency fees; and

(5) A copy of this procedure.

Step II

Within 30 days of the MEA providing the information identified in Step I, non-union employees shall give written

notice to the Executive Director of MEA at 1216 Kendale Boulevard, P.O. Box 2573, East Lansing, Michigan 48823, either by mail or by personal delivery, of the non-union employee's decision to:

(1) Join the union and pay union dues;

(2) Pay a service fee equal to dues less the pro rata cost of liability insurance provided to union members;

(3) Pay the reduced fee as determined by the Executive Director; or

(4) Pay the reduced fee into an interest-bearing escrow account with First of America-Central Bank of Lansing, Michigan, and challenge the reduced fee.

The non-union member may challenge the NEA portion of the reduced fee, the MEA portion of the reduced fee, the local portion of the reduced fee, or any combination thereof. Failure to provide timely notice will result in the non-union employee being required to pay a service fee equal to dues less the pro rata cost of liability insurance provided to union members. The challenge to the reduced fee will serve as the challenge for both the 1987-88 and 1988-89 fiscal years. At the time of filing an objection, the non-member shall pay the full amount of the reduced fee for the 1987-88 fiscal year and that portion of the 1988-89 reduced fee which has accrued into the First of America-Central escrow account. Collection of service fees for non-members will not begin until after the period for written objection has expired. All such payments required of an objecting non-member by these procedures shall be paid into the First of America-Central escrow account and shall remain in said account until such time as the arbitrator has issued his or her decision on the proportion

of the agency fee that is chargeable to non-members. Thereafter all such funds in the escrow account shall be disbursed in conformity with these procedures.

Non-union employees who become part of the bargaining unit after the MEA has provided the information identified in Step I, shall be provided with the information identified in Step I within 30 days of becoming a member of the bargaining unit and shall have 30 days from the time MEA provides the information in which to give the written notice to the Executive Director of MEA described in Step II. If the non-union employee challenges the reduced fee and the challenge occurs too late to allow the employee to participate in the hearing described in Step III of these procedures, no separate hearing shall be held, but the non-union employee's agency fees will be determined based upon the hearing described in Step III.

Step III

Within 15 days of the deadline for providing written notice challenging the reduced fee, the MEA will initiate the procedure for a consolidated hearing of all objections before an impartial decision-maker. For this year only, the hearing will involve the agency fee for both fiscal 1987-88 and fiscal 1988-89, since the same data will be used to determine the fees. An arbitrator will be selected pursuant to the Rules for Impartial Determination of Union Fees of the American Arbitration Association (said rules being attached to this procedure) and the conduct of the hearing shall proceed in accordance with those rules, except that the union may not waive oral hearings pursuant to Rule 19.

After the hearing, the arbitrator shall determine the proportion of the agency fee that is chargeable to non-members under applicable law. The arbitrator shall issue the decision and determination not later than 30 days from

the closing of the hearing, but in no event later than May 1, 1989, and submit copies to the MEA and to each objector. In no event may the arbitrator determine the agency fee that is chargeable to non-members to be an amount greater than the reduced agency fee.

After the arbitrator's decision, the MEA shall direct the disbursement of all funds in the escrow account, including interest, to the proper parties in accordance with the arbitrator's decision. If the objector has not paid sufficient money into the escrow account for the 1988-89 fiscal year, the objector shall be responsible for payment of the difference between the amount determined chargeable by the arbitrator and the amount actually paid into escrow.

The objectors and/or the NEA, MEA, or local association may challenge the arbitrator's decision, pursuant to law, but such challenge, if successful, shall not result in an agency fee greater than that determined by the arbitrator.

POLICY REGARDING OBJECTIONS TO POLITICAL-IDEOLOGICAL EXPENDITURES

Upon timely objection, no individual required to pay a service fee to the Michigan Education Association (MEA) or a local affiliate shall be required, through the payment of such a fee, to contribute to the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment and lawfully chargeable employee representation. An individual who, in compliance with the administrative procedures established by the Executive Director of the Michigan Education Association, objects to the use of a portion of his/her service fees to support such an ideological cause or political activity shall be required to pay a reduced fee based upon a determination of the

percentage of the MEA's annual expenditures for the prior year necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees.

APPENDIX F

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

January 3, 1989

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JAMES P. LEHNERT,
ELMER S. JUNKER,
JAMES E. LINDSEY,
SAM C. PETICOLAS,
JOHN R. SCHAUBLE,
and
THEODORE D. SPEERMAN,

Plaintiffs,

v File No. G78-346 CA1

THE FERRIS FACULTY ASSOCIATION-MEA-MEA,
MICHIGAN EDUCATION ASSOCIATION,
NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES,
THE BOARD OF CONTROL OF FERRIS STATE COLLEGE,
S. EUGENE BYCHINSKY,
ROBERT D. EWIGLEBEN,
EARL D. GABRIEL,
ROBERT P. GERHOLZ,
FRAN HARRIS,
DELBERT D. LONG,
ROBERT C. REDMAN,
THOMAS P. SCHOLLER,
PATRICIA M. SHORT,
and
STEVEN L. THOMAS,

Defendants.

JUDGMENT

In accordance with the opinion dated January 3, 1989;

IT IS HEREBY ORDERED that defendants' motion to dissolve the August 25, 1986 injunction preventing collection of future service fees is GRANTED;

IT IS FURTHER ORDERED that plaintiffs' motion for an injunction pending appeal is DENIED.

DATED in Kalamazoo, MI:

Jan. 3, 1989

/s/
RICHARD A. ENSLEN
U.S. District Judge

APPENDIX G

RELEVANT PARTS OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT, § 10, MICH. COMP. LAWS § 423.210

Relevant Parts of the Michigan Public Employment Relations Act, § 10, Mich. Comp. Laws § 423.210

423.210 Prohibited conduct; service fee.

Sec. 10. (1) It shall be unlawful for a public employer or an officer or agent of a public employer * * * (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative * * * .

(2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

APPENDIX H

RELEVANT PART OF MICHIGAN COMPILED LAWS § 408.477

Relevant Part of Michigan Compiled Laws § 408.477

408.477 Deductions from wages.

Sec. 7. With the exception of those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction. * * *

APPENDIX I

RELEVANT PARTS OF AMERICAN ARBITRATION ASSOCIATION RULES FOR IMPARTIAL DETERMINATION OF UNION FEES

Relevant Parts of American Arbitration Association Rules for Impartial Determination of Union Fees (effective June 1, 1986)

3. Appointment of Arbitrator

Upon receiving such an initiating letter, but prior to making an appointment, the AAA will select an Arbitrator from a special panel of experienced labor Arbitrators who is willing to hear and decide such issues in accordance with the applicable law and the union's internal procedures, and who is prepared to meet the applicable time limits. Thereupon, the AAA will appoint the Arbitrator to the case, notifying the union and the other participants.

4. Disclosure of Grounds for Disqualification

Prior to accepting the appointment, a prospective Arbitrator shall disclose any circumstances likely to create a presumption of bias. In its discretion, the AAA may disqualify an Arbitrator based on such disclosure. After participants in the procedure are notified of an appointment, they may challenge an Arbitrator for cause by promptly notifying the AAA of their objection.

APPENDIX J

MEMORANDUM FROM BOB CHANIN, NEA GENERAL COUNSEL, TO EXECUTIVE DIRECTORS AND ATTORNEYS IN AGENCY FEE STATES

(September 30, 1987)
(Dist. Ct. Record 260:
Affidavit of Milton L. Chappell,
Exhibit 1)

LEGAL SERVICES
OFFICE OF GENERAL COUNSEL

NATIONAL EDUCATION ASSOCIATION • 1201 16th St., N.W., Washington, D.C. 20036-3290 • (202) 822-7035

DON CAMERON, Executive Director

MARY HATWOOD FUTRELL, President
KEITH GEIGER, Vice President
ROXANNE E. BRADSHAW, Secretary-Treasurer

September 30, 1987

M E M O R A N D U M

TO: Executive Directors and Attorneys in Agency Fee States

FROM: Bob Chanin /s/ OFFICE:

RE: Andrews, et al. v. Education Association of Cheshire, et al (Connecticut Agency Fee Case)

Several months ago we sent you a copy of the decision of the United States District Court for the District of Connecticut in Andrews, et al. v. Education Association of Cheshire, et al. In this decision, the district court sustained the constitutionality of the procedure for the collection of agency fees that was adopted by the Connecticut Education Association following the Supreme Court decision in Chicago Teachers Union v. Hudson. (The CEA procedure is essentially the NEA "model" procedure adjusted to comply with state statutory requirements; a copy of the CEA procedure was sent to you previously.) The plaintiffs, who are represented by the National Right to Work Legal Defense Foundation, appealed certain aspects of the district court's decision to

the Second Circuit Court of Appeals -- specifically, the appeal focused on the extent to which information provided to potential feepayers must be audited and whether the American Arbitration Association constitutes an "impartial decisionmaker."

The Second Circuit Court of Appeals issued its decision on September 21, 1987. With one relatively insignificant exception (involving the right of the union under the American Arbitration Association's rules unilaterally to waive an oral hearing), the Second Circuit affirmed the decision of the district court "in all respects." A copy of the Second Circuit's decision is enclosed. The position taken by the Second Circuit regarding Hudson's auditing requirement appears to be in conflict with the position taken by the Sixth Circuit in its July 27, 1987 decision in Tierney, et al. v. City of Toledo. If a petition for a writ of certiorari is filed in one or both of these cases, the Supreme Court may well agree to consider the issue. We will keep you informed of developments.

BC:gm
Attachment

cc: Mike Dunn
Richard Kirshner
Larry Weinberg
Jack Getman
Robert Coulson
Arvid Anderson
NEA Regional Directors

EXHIBIT 1

Supreme Court, U.S.
FILED
MAY 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES E. LINDSEY, *et al.*,
Petitioners,

v.

FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT H. CHANIN
(Counsel of Record)
BRUCE R. LERNER
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

ARTHUR PRZYBYLOWICZ
WHITE, BEEKMAN, PRZYBYLOWICZ,
SCHNEIDER & BAIRD
2214 University Park Drive
Okemos, Michigan 48805
(517) 349-7744

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred when it concluded, based on the factual findings of the District Court, that the financial information sent to nonmember employees prior to the collection of service (*i.e.*, agency) fees—which included lists of the major categories of respondent unions' expenses that were verified by an independent auditor and identified which of those expenses were legally chargeable and legally nonchargeable to objecting nonmember employees—satisfies the footnote reference in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), to "verification by an independent auditor."

II. Whether the Court of Appeals erred when it concluded that the decision of respondent unions to use the American Arbitration Association to select an arbitrator to hear challenges by objecting nonmember employees to the amount of the service fee satisfies the requirement of *Hudson*, 475 U.S. at 308 n.21, 310, that such employees be provided with an "opportunity to challenge the amount of the fee before an impartial decisionmaker" whose "selection [does] not represent the Union's unrestricted choice."

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
A. The Background Facts	1
1. The Notice Sent to Nonmember Employees	3
2. The Role Played by the AAA	4
B. The Decisions Below	5
1. The District Court	5
2. The Court of Appeals	6
REASONS FOR DENYING THE WRIT	8
I. THE FINANCIAL INFORMATION DISCLOSED TO NONMEMBER EMPLOYEES UNDER THE MEA PROCEDURE SATISFIES THE "AUDITING REQUIREMENT" SET FORTH IN *HUDSON*	9
II. THE SELECTION OF AN EXPERIENCED LABOR ARBITRATOR BY THE AAA SATISFIES THE "IMPARTIAL DECISIONMAKER" REQUIREMENT SET FORTH IN *HUDSON*	17
CONCLUSION	22

TABLE OF AUTHORITIES

Cases Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 9, 10
Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 21
Andrews v. Education Association of Cheshire, 829 F.2d 335 (2d Cir. 1987) ..... *passim*
Antry v. Illinois Educational Labor Relations Board, 552 N.E.2d 313 (Ill. Ct. App. 1990) 14
Cramer v. Matish, 705 F. Supp. 1234 (W.D. Mich. 1988), *appeal pending*, Nos. 89-1885 & 89-2077 .. 15
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) ..... *passim*
Crawford v. ALPA, 870 F.2d 155 (4th Cir. 1989), *vacated and rehearing en banc granted on other grounds*, No. 88-2083 18
Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987) 7, 14, 15, 18
Dashiell v. Montgomery County, 731 F. Supp. 1251 (D. Md. 1990) 14
Gillespie v. Willard City Bd. of Education, 700 F. Supp. 898 (N.D. Ohio 1987) 15, 18
Gilpin v. AFSCME, 875 F.2d 1310 (7th Cir.), *cert. denied*, 110 S. Ct. 278 (1989) 14
Gwirtz v. Ohio Education Association, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1810 (1990) ..... *passim*
Hohe v. Casey, 695 F. Supp. 814 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989) 15
Hohe v. Casey, 727 F. Supp. 163 (M.D. Pa. 1989) .. 16
Horton Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976) 21
Hudson v. Chicago Teachers Union, 699 F. Supp. 1334 (N.D. Ill. 1988) 14
Kidwell v. Transportation Communications Int'l Union, 731 F. Supp. 192 (D. Md. 1990) 18
Lowary v. Lexington Local Bd. of Education, 704 F. Supp. 1430 (N.D. Ohio 1987), *aff'd on reconsideration*, 704 F. Supp. 1456 (N.D. Ohio), *appeal pending on other grounds*, No. 88-4191 ..... 14, 18

TABLE OF AUTHORITIES—Continued

	Page
Ping v. NEA, 870 F.2d 1369 (7th Cir. 1989)	14, 18
Railway Clerks v. Allen, 373 U.S. 113 (1963)	10
Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987)	14, 15
Thor Power Tool Co. v. Commissioner, 439 U.S. 522 (1979)	13
United States v. Arthur Young & Co., 465 U.S. 805 (1984)	13
Statutes	
Mich. Comp. Laws § 423.210	2
Miscellaneous	
American Institute of Certified Public Accountants, Statement on Auditing Standards § 110.03	13
American Institute of Certified Public Accountants, Statement on Auditing Standards § 337.06	13
F. Elkouri & E. Elkouri, *How Arbitration Works* (4th ed. 1985)	18, 19, 20
O. Fairweather, *Practice and Procedure in Labor Arbitration* (2d ed. 1981)	18
Montgomery's Auditing (10th ed. 1985)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1415

JAMES E. LINDSEY, *et al.*,
Petitioners,

v.

FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Ferris Faculty Association-MEA-NEA, Michigan Education Association, and National Education Association file this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. The Background Facts

Petitioners are three faculty members at Ferris State College, a public institution of higher education in Michigan. Since at least 1975, the Ferris Faculty Association-MEA-NEA ("FFA")—a local affiliate of the Michigan Education Association ("MEA") at the state level and the National Education Association ("NEA") at the national level—has been recognized as the exclusive representative for a bargaining unit consisting of all faculty

at the college.[1] Although petitioners are members of the bargaining unit represented by FFA, they have refused to join FFA or its affiliated state and national organizations.

In its capacity as exclusive representative, FFA has entered into a collective bargaining agreement with Ferris State College. As permitted by Michigan law—specifically, Mich. Comp. Laws § 423.210, *reprinted in* Appendix to Petition ("App.") at 119a—that collective bargaining agreement includes a service-fee provision, pursuant to which all employees in the bargaining unit who are not members of FFA ("nonmember employees") are required to pay a fee for services rendered by FFA and its affiliated organizations. In accordance with the collective bargaining agreement, the service fee charged to nonmember employees is "equivalent to the amount of dues uniformly required of members of [FFA], less any amounts not permitted by law." App. at 8a n.3.

To collect these service fees, the associations follow a procedure that was adopted by MEA to govern fee collections from all nonmember employees in Michigan who are covered by service-fee provisions involving one of MEA's affiliated local associations ("MEA Procedure").[2] Only two aspects of the MEA Procedure are being challenged by petitioners—namely, the sufficiency of the audited financial information included in the notice that is annually sent to nonmember employees, and the use of the American Arbitration Association ("AAA") to select the arbitrator who serves as the impartial decisionmaker to hear challenges to the amount of the fee. We therefore describe those aspects of the MEA Procedure in some detail.

---

[1] For purposes of simplicity, FFA, MEA, and NEA are sometimes hereinafter referred to collectively as the "associations."

[2] A copy of the relevant MEA Procedure is included in the final opinion of the District Court. *See* App. at 111a-116a.

1. *The Notice Sent to Nonmember Employees*: By November 30 of each school year, the Executive Director of MEA is required to determine which expenditures of FFA (and other local associations collecting a local portion of the service fee), MEA, and NEA during the prior fiscal year are legally chargeable and legally nonchargeable to objecting nonmember employees. *See* App. at 111a. Based on this determination, the Executive Director calculates a reduced service fee that the associations believe an objecting nonmember employee may legally be required to pay. *See id.* In order to provide a "cushion" for disputed chargeable expenditures, the amount of the reduced service fee that actually is charged objecting nonmember employees is five dollars less than the amount calculated by the Executive Director. *Id.* at 112a.

The associations then provide all nonmember employees who are required to pay a service fee with "adequate information identifying the NEA's, MEA's and local associations' total expenditures [that is] sufficient to enable them to assess the propriety of the service fee calculation." *Id.* This information includes lists of expenditures made by NEA, MEA, and FFA that are broken down into major categories of expenses. *Id.* Independent auditors verify that the money in fact was expended in the manner indicated, and the associations provide "an identification of whether [each] major category of expense, or a particular portion thereof, is chargeable to objectors." *Id.* In addition, the information distributed to nonmember employees sets forth the amount of the reduced fee, explains the method used to calculate that reduced fee, and provides the nonmembers with a copy of the MEA Procedure. *Id.*

After receiving the information described above, each nonmember employee has a period of thirty days within which to file a written objection to the amount of the reduced service fee. *See* App. at 112a-113a. No nonmember is required to pay any portion of the fee until

the thirty-day period has expired. An objection may be in general terms, and a nonmember need not single out any particular expenditure nor specify any particular reason for his or her objection. Moreover, if a nonmember objects, the entire amount of his or her reduced service fee is placed in an interest-bearing escrow account until the impartial decisionmaker issues a decision on the exact proportion of the fee that is lawfully chargeable to objecting nonmember employees. *See* App. at 113a-114a.

2. *The Role Played by the AAA*: Within fifteen days of the deadline by which nonmembers must file written objections to the amount of the fee, the associations are required to contact the AAA and request it to appoint an arbitrator to serve as the impartial decisionmaker who will "determine the proportion of the [service] fee that is chargeable to non-members under applicable law." App. at 114a. The arbitrator is selected, and, with one exception, the hearing before the arbitrator is conducted, in accordance with the AAA Rules for Impartial Determination of Union Fees ("AAA Rules").[3] At this hearing, the burden is on the associations to prove the proportion of their expenditures that lawfully may be charged to objecting nonmember employees. AAA Rules at Explanation.

Of particular relevance to this appeal is Rule 4 of the AAA Rules, which prohibits an arbitrator from serving

---

[3] The exception relates to the first sentence of Rule 19 of the AAA Rules, which allows the associations unilaterally to waive oral hearings before the arbitrator. The MEA Procedure does not provide for such a waiver, thereby complying with the decision of the Second Circuit in *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 341 (2d Cir. 1987), which concluded that, with the exception of the waiver provision in Rule 19, the AAA Rules satisfy all constitutional requirements.

A complete version of the AAA Rules appears at several points in the record before the Court of Appeals. *See, e.g.*, Affidavit of Beverly J. Wolkow (March 15, 1988); Affidavit of Beverly J. Wolkow (April 18, 1988).

as the impartial decisionmaker if he or she cannot function in an unbiased manner. That rule specifically allows for the disqualification of an arbitrator by the AAA at two different points in the selection process: at the AAA's own initiative based on disclosures by the arbitrator prior to his or her accepting the appointment, and subsequent to the appointment based on a challenge initiated by any employee or association participating in the arbitration.[4]

B. The Decisions Below

1. *The District Court*: After a long and complex procedural history, the District Court issued a series of opinions in which it concluded that the MEA Procedure satisfied all constitutional requirements. *See* App. at 68a-85a, 86a-97a, 98a-116a. In those opinions, the court specifically rejected the arguments that petitioners now present to this Court. With regard to the auditing component of the MEA Procedure, the District Court stated:

> The independent auditor will verify the amount of expenditures that were made in both chargeable and

---

[4] AAA Rule 4 provides as follows:

> *Disclosure of Grounds for Disqualification*—Prior to accepting the appointment, a prospective Arbitrator shall disclose any circumstances likely to cause a presumption of bias. In its discretion, the AAA may disqualify an Arbitrator based on such disclosure. After participants in the procedure are notified of any appointment, they may challenge an Arbitrator for cause by promptly notifying the AAA of their objection.

During the arbitration, each nonmember who has challenged the amount of the service fee is afforded a full opportunity to participate in the hearing. For example, each nonmember is entitled to be represented by counsel or other authorized representative, and to present evidence, including affidavits or live testimony from relevant witnesses, documents, and other exhibits. All participants also are entitled to examine whatever evidence is submitted to the arbitrator by other parties, and to submit written briefs after all such evidence is accumulated. In addition, throughout the hearing, the arbitrator is granted broad discretion in determining "how the case may best be presented so that all participants have a fair opportunity to contest the issues." *See* AAA Rules 7, 8, 12, 14, 15, 16.

> nonchargeable areas. It is clear that under the [associations'] procedures the auditor will not make the legal determination of which expenditures are chargeable or nonchargeable, but rather will only verify that the expenditures were actually made in the categories determined by the [associations] to be chargeable or nonchargeable. [App. at 73a.]
>
> * * * *
>
> [Petitioners'] approach would have the auditor function as both "an auditor in the traditional sense and as the independent decision maker as to chargeable expenses." *Andrews*[*v. Education Association of Cheshire*], 829 F.2d at 340. My reading of *Hudson* . . . leads me to conclude that all that is required is that an independent auditor, at the audit stage, verify the union's *calculations* and *disbursements* which have been presented to the nonmember. [App. at 74a (emphasis in original).]

With regard to the MEA Procedure's use of the AAA to select an arbitrator to serve as the impartial decisionmaker, the District Court stated:

> *Hudson* noted "that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decision maker, so long as the arbitrator's selection did not represent the union's unrestricted choice." [App. at 81a (quoting *Hudson*, 475 U.S. at 308 n.21).]
>
> * * * *
>
> I am not persuaded that [petitioners'] affidavits have raised a material fact with respect to the issue of "actual and or apparent bias" of the AAA. . . . I find that the proposed use of the AAA comports with the impartiality requirement set forth in *Hudson*. [App. at 82a.]

2. *The Court of Appeals:* On appeal to the Sixth Circuit, petitioners again argued that the MEA Procedure failed to satisfy the standards set forth in *Hudson* with regard to the role of the independent auditor and the

selection of the impartial decisionmaker. The Court of Appeals summarily rejected both of these arguments based on prior decisions of the Sixth Circuit that already had applied the decision in *Hudson* in circumstances identical to the facts of this case.

Specifically, with regard to the independent auditor, the Court of Appeals referred to its recent decision in *Gwirtz v. Ohio Education Association*, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1810 (1990), for the proposition that *Hudson* does "not require the independent auditor to make a determination of chargeability, which is essentially a legal determination." App. at 3a. The point was more fully explained by the court in *Gwirtz*, which reasoned as follows:

> On the question of "verification" by an auditor, we reject the plaintiffs' argument that the function of the independent auditor is to verify the union's calculation of the chargeable or nonchargeable nature of the major categories of union expenditures. Whether a union expenditure is "chargeable" or "nonchargeable" to nonmember employees is a *legal* determination that depends upon the type of union activity for which the expenditure is made. It is not the role of an auditor to make such a legal determination. Rather, an auditor's role is to verify the expenditures made by the union so as to ensure that the expenditures that the union claims it made for particular expenses were actually made for those expenses. *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987). Because the audit performed by an independent auditor in this case did so verify the expenditures of the Association, we hold that the audit met the constitutional standards of *Hudson*. [887 F.2d at 682 n.3 (emphasis in original).]

In response to petitioners' second argument, the Court of Appeals cited *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987), in which the Sixth Circuit "rejected a claim of 'generalized bias' against the American Arbitration

Association and pointed out that the [AAA] Rules for Impartial Determination of Union Fees . . . contain several safeguards against bias or prejudice by an arbitrator." App. at 3a. Indeed, the court noted, "[i]f [petitioners] perceive a proposed or selected arbitrator as biased, these safeguards are available to them as a means of challenging the appointment." App. at 3a.

Having summarily rejected petitioners' specific arguments, the Court of Appeals ended its opinion by putting its approval of the MEA Procedure into the proper context:

> The complaint in this case was filed on May 22, 1978. The district court has given careful consideration to every argument put forward by [petitioners] and has required the union to "toe the line" in fashioning a process for imposition of service fees that fully meets the constitutional standards enunciated by the Supreme Court in *Hudson*. An examination of the record discloses a meticulous attention to detail by the district court and a result that satisfies *Hudson* as interpreted by our later decisions. [App. at 4a.]

REASONS FOR DENYING THE WRIT

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), this Court reaffirmed that it is constitutional for a public employer and a union serving as the exclusive bargaining representative "to require nonunion employees, as a condition of employment, to pay a fair share of the union's cost of negotiating and administering a collective-bargaining agreement." 475 U.S. at 301. At the same time, the Court recognized that the collection of service fees has the potential for infringing on the First Amendment rights of nonmember employees, and therefore concluded that an exclusive representative must meet certain procedural requirements when collecting such fees. The overall "objective," the Court indicated, is "to devise a way of preventing compulsory subsidiza-

tion of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 302 (quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977)).

The Court then affirmatively set forth certain requirements that a procedure for the collection of service fees must meet in order to pass constitutional muster, including "an adequate explanation of the basis for the fee [and] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." 475 U.S. at 310.

In this case, petitioners raise two questions about the Court of Appeals' application of these requirements to the MEA Procedure. As we now demonstrate, however, neither of these questions warrant full consideration by this Court.

I. THE FINANCIAL INFORMATION DISCLOSED TO NONMEMBER EMPLOYEES UNDER THE MEA PROCEDURE SATISFIES THE "AUDITING REQUIREMENT" SET FORTH IN *HUDSON*

The threshold obligation that *Hudson* imposes upon an exclusive representative that seeks to collect service fees is to provide all nonmember employees with "*an adequate explanation* of the basis for the fee." 475 U.S. at 310 (emphasis added). *See id.* at 306 (nonmembers must "be given sufficient information to gauge the propriety of the union's fee"); *id.* (it is inadequate to "leav[e] the nonunion employees in the dark about the source of the figure for the agency fee").

The Court in *Hudson* also specified the information that unions must distribute to nonmember employees in order to meet this requirement. The Court initially stated that a union must "identify[] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as

members—and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07. In subsequent footnotes, the Court elaborated on this general standard, first characterizing the union's obligation to provide information to nonmember employees as a "limited notice requirement" that should not impose an "undue burden" on the union, *id.* at 306 n.17, and then stating that a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," *id.* at 307 n.18. *See id.* (there necessarily exist "practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required' ") (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), and *Abood*, 431 U.S. at 239-40 n.40). Finally, and of particular relevance here, the Court noted that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18.

A. The financial information disclosed to nonmember employees under the MEA Procedure clearly satisfies these standards. By its own terms, the MEA Procedure requires the associations to "provide to all non-union employees who are required to pay an agency fee adequate information identifying the NEA's, MEA's and local associations' total expenditures for the [relevant] fiscal year sufficient to enable them to assess the propriety of the service fee calculation," App. at 112a, including—for NEA, MEA, and FFA—a list of expenditures, broken down by major category, that is verified by an independent auditor. As the District Court expressly found, "[t]he independent auditor will verify the amount of expenditures that were made in both chargeable and nonchargeable areas." App. at 73a. Although the courts below acknowledged that "the auditor will not make the legal determination of which expenditures are chargeable or nonchargeable," they nonetheless concluded that the MEA Procedure complies with the auditing requirement set forth in footnote 18 of *Hudson* because the auditor

will "verify that the expenditures were actually made in the categories determined by the [associations] to be chargeable or nonchargeable." *Id.* *See id.* at 2a, 74a (finding that "an independent auditor, at the audit stage, [will] verify the union's *calculations* and *disbursements* which have been presented to the nonmember") (emphasis in original).

B. Petitioners challenge this ruling on two grounds. First, they assert that the MEA Procedure "provide[s] for verification of neither the calculations nor expenditures after the MEA determines whether they are chargeable or not." Petition at 10. With this argument, however, petitioners are merely seeking to relitigate the factual questions decided below. As noted previously, the District Court found that the independent auditor under the MEA Procedure "will verify the amount of expenditures that were made in both chargeable and nonchargeable areas" and "will verify the union's calculations and disbursements which have been presented to the nonmember." App. at 73a-74a (emphasis omitted). These findings were expressly upheld by the Court of Appeals. App. at 2a. Although petitioners obviously disagree with these factual findings of the courts below, that disagreement does not warrant review by this Court.

Second, petitioners contend that the single reference in footnote 18 of *Hudson* to "verification by an independent auditor" creates a constitutional requirement that the auditor determine whether the associations correctly categorized their expenditures as legally chargeable and legally nonchargeable. Thus, according to petitioners, the courts below erred when they concluded "that an auditor cannot verify a union's calculation of the chargeable and nonchargeable nature of its expenses, because that 'would have the auditor making a legal, not an accounting, decision.'" Petition at 11. But this ruling by the courts below not only is plainly correct, but also is fully consistent with the conclusion of every appellate court that has considered the issue.

The primary purpose behind *Hudson*'s notice requirement is to ensure that a nonmember employee has sufficient information to decide whether or not to object to the amount of the service fee. In order to make this decision, the Court in *Hudson* indicated that the nonmember employee should be provided with two types of information. First, the nonmember needs financial information that sets forth the actual amount of expenditures in each of the union's "major categories of expenses," which information the Court stated should be verified by an independent auditor to ensure its accuracy. 475 U.S. at 307 n.18. In addition, the nonmember needs to know which major categories of expenses, and what amounts within these categories, the union believes to be lawfully chargeable to objecting nonmember employees—*i.e.*, the union should "identif[y] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as members —and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07. With this information in hand, the nonmember will be able to make an informed decision on whether to object to the amount of the service fee being charged by the union.[5]

Thus, notwithstanding petitioners' argument to the contrary, there is nothing in footnote 18 of the *Hudson* decision to suggest that an independent auditor is required to verify the union's breakdown between legally chargeable and legally nonchargeable expenditures. In-

---

[5] To be sure, the obligation imposed on a nonmember who decides to file an objection to the amount of the fee should not be burdensome. That is why, after receiving the required information, the nonmember who wants to object to the fee is merely required "to make his objection known." 475 U.S. at 306 n.16. *See supra* at 4 (discussing the minimal obligation of a nonmember under the MEA Procedure). And the information needed to make such a general objection is obviously much less than would be the case if the objector were required to specify the basis for his or her objection or to identify particular expenditures to which he or she objects.

deed, such an interpretation of footnote 18 makes no sense, inasmuch as it would require a *financial* expert (*i.e.*, the independent auditor) to make a *legal* judgment (*i.e.*, the determination of which expenditures are chargeable to objecting nonmember employees).[6] It is precisely

---

[6] Petitioners apparently agree that "accountants do not make legal decisions," but nonetheless argue that auditors "often review statutes and case law to evaluate clients' legal positions in accounting matters." Petition at 11-12 (emphasis omitted) (citing *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), and *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979)). But this argument is misdirected, and these alleged precedents have no relevance in the present context. As petitioners concede, an auditor's familiarity with legal positions is limited to "accounting matters," Petition at 11, and does not extend to legal questions involving other matters, such as public-sector labor relations. *See, e.g., Arthur Young*, 465 U.S. at 812 (auditors merely obliged to analyze corporation's "reserve account for contingent tax liabilities" in light of "relevant [Internal Revenue] Code provisions, Treasury Regulations, Revenue Rulings, and case law"). This limitation on the professional competence of auditors is an accepted part of the accounting profession, and is commonly recognized by learned treatises in the field. *See, e.g.*, American Institute of Certified Public Accountants, Statement on Auditing Standards § 337.06 ("[a]n auditor ordinarily does not possess legal skills and, therefore, cannot make legal judgments concerning information coming to his attention"); *id.* § 110.03 ("The professional qualifications required of the independent auditor are those of a person with the education and experience to practice as such [and] do not include those of a person trained for or qualified to engage in another profession or occupation. For example, . . . [an auditor] does not purport to act in the capacity of a lawyer and may appropriately rely upon the advice of attorneys in all matters of law."); *Montgomery's Auditing* at 22-23 (10th ed. 1985) ("The expertise of most auditors is limited to law and regulations that are financial in nature, . . . [and] [a]uditors generally do not have the background and training to evaluate the degree to which an enterprise conforms to the myriad other laws and regulations that are part of modern society."). Auditors therefore are neither qualified nor capable of verifying a union's breakdown between legally chargeable and legally nonchargeable expenditures, and any opinions that they may express about these matters (assuming, *arguendo*, that auditors could be found to undertake such tasks) would be wholly unreliable and ultimately misleading to nonmember employees.

for this reason that the position urged by petitioners in this case has been uniformly rejected by every federal and state appellate court that has directly addressed the issue. *See Gwirtz*, 887 F.2d at 682 n.3 (quoted *supra* at 7); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987); *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987);[7] *Ping v. NEA*, 870 F.2d 1369, 1374 (7th Cir. 1989); *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.), *cert. denied*, 110 S. Ct. 278 (1989); *Antry v. Illinois Educational Labor Relations Board*, 552 N.E.2d 313, slip op. at 26, No. 4-88-0314 (Ill. Ct. App. 1990). *See also Dashiell v. Montgomery County*, 731 F. Supp. 1251 (D. Md. 1990); *Hudson v. Chicago Teachers Union*, 699 F. Supp. 1334, 1342 (N.D. Ill. 1988); *Lowary v. Lexington Local Bd.*

---

[7] In *Andrews*, plaintiffs attacked the adequacy of the financial information provided to nonmember employees by the Connecticut Education Association and NEA, arguing, as do petitioners in this case, that "it does not provide for an independent audit of the breakdown of expenditures to each major category of chargeable activities, even though it does provide for independent verification of the past-year's expenditures." 829 F.2d at 339. The Second Circuit unanimously rejected this argument, reasoning as follows:

> [The nonmembers'] claim that *Hudson* requires that both the union's expenditures and its allocation of expenses to chargeable and nonchargeable categories be audited turns on an interpretation of the purpose of an audit. [The nonmembers'] approach to this problem would have the auditor making a legal, not an accounting, decision regarding the appropriateness of the allocation of expenses to the chargeable and nonchargeable categories. We believe, however, that *Hudson*'s auditor requirement is only designed to ensure that the usual function of an auditor is fulfilled. That usual function is to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses. The union's plan satisfies this requirement. The [nonmembers'] interpretation of *Hudson*'s auditing requirement is overly broad because it seeks to have the auditor function both as an auditor in the traditional sense and as the independent decisionmaker as to chargeable expenses. [*Id.* at 340.]

of Education, 704 F. Supp. 1456, 1460-63 (N.D. Ohio 1988), *appeal pending on other grounds*, No. 88-4191; *Cramer v. Matish*, 705 F. Supp. 1234, 1237-38 (W.D. Mich. 1988), *appeal pending*, Nos. 89-1885 & 89-2077; *Gillespie v. Willard City Bd. of Education*, 700 F. Supp. 898, 902 (N.D. Ohio 1987); *Hohe v. Casey*, 695 F. Supp. 814, 820 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989).

Notwithstanding this overwhelming body of consistent precedent, petitioners assert that "the decisions of the lower courts are in conflict as to the nature of the independent verification required by *Hudson*." Petition at 20. This assertion, however, is patently frivolous.

First, petitioners contend that the decisions of the Sixth Circuit in *Tierney* and *Damiano* require an independent auditor to verify the union's breakdown between legally chargeable and legally nonchargeable expenditures, thus creating an *intra*-circuit conflict between those decisions and the Sixth Circuit's more recent decisions in *Gwirtz* and the instant case. But even assuming for the sake of argument that an internal conflict among decisions of the Sixth Circuit would provide a basis for this Court's review, the Sixth Circuit has expressly and emphatically rejected—in both *Gwirtz* and in the instant case—petitioners' interpretation of its prior decisions in *Tierney* and *Damiano*. In *Gwirtz*, for example, the Sixth Circuit stated that *Tierney* and *Damiano* "merely recited and then applied the standards in *Hudson*," and thus if a union's financial disclosures "satisfy the constitutional requirements of *Hudson*, the disclosures are also constitutionally sufficient under *Damiano* and *Tierney*." 887 F.2d at 682. And in this case, the court reiterated its holding in *Gwirtz* that nothing in its prior decision in *Tierney* could be read to "require the independent auditor to make a determination of chargeability, which is essentially a legal determination." App. at 3a. Indeed, the court in this case noted specifically that "[u]pon suggestion that

Gwirtz was inconsistent with *Tierney* with respect to this issue, the court considered a petition for rehearing en banc and declined to rehear *Gwirtz*." App. at 3a.

The only other case petitioners rely upon to demonstrate an alleged "conflict" among the lower courts is *Hohe v. Casey*, 727 F. Supp. 163 (M.D. Pa. 1989), but this reliance also is misplaced. Although at one point in its opinion the district court in *Hohe* stated that *Hudson* requires an auditor to verify the "breakdown between chargeable and nonchargeable costs," *id.* at 167, the court clearly did not understand *Hudson* to require, as part of that verification, that the auditor make the legal determination of what expenses are legally chargeable and legally nonchargeable. To the contrary, the court in *Hohe* expressly referred to the Sixth Circuit's decision in *Gwirtz* as a case in which the union had provided nonmember employees with a sufficient "audi[t] [of] the breakdown of chargeable and non-chargeable expenses," *id.* at 166, and specifically noted that "[t]he verification must be what an accountant would do when undertaking an audit," *id.* Thus, far from creating a conflict among prior decisions, the decision in *Hohe* expressly agreed with the holding of the Sixth Circuit in *Gwirtz* (as expressly reaffirmed in the instant case), that "*Hudson*'s auditor requirement is only designed to ensure that the usual function of an auditor is fulfilled"—*i.e.*, "to insure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." 727 F. Supp. at 166 (quoting, with approval, from the decision of the Second Circuit in *Andrews*, 829 F.2d at 340).

In short, consistent with all lower court decisions, the Court of Appeals in this case correctly concluded that the MEA Procedure satisfies the requirement in *Hudson* that a union provide nonmembers with "an adequate explanation" of the service fee that includes "the major categories of expenses, as well as verification by an independ-

ent auditor." 475 U.S. at 307 n.18, 310. Accordingly, the decision below does not merit further review by this Court.[8]

II. THE SELECTION OF AN EXPERIENCED LABOR ARBITRATOR BY THE AAA SATISFIES THE "IMPARTIAL DECISIONMAKER" REQUIREMENT SET FORTH IN *HUDSON*

In *Hudson*, this Court also held that objecting nonmember employees must be provided with an "opportunity to challenge the amount of the fee before an impartial decisionmaker," 475 U.S. at 310, and that "expeditious arbitration" would be sufficient for this purpose "so long as the arbitrator's selection did not represent the Union's unrestricted choice," *id.* at 308 n.21. To meet this requirement, the MEA Procedure utilizes the AAA Rules for Impartial Determination of Union Fees, pursuant to which the AAA is given the task of selecting an experienced labor arbitrator to hear any challenges to the amount of the service fee charged by FFA and other local affiliates of MEA and NEA. Although petitioners contend that the use of the AAA to select an arbitrator is constitutionally unacceptable, their arguments do not warrant further review by this Court.

In *Hudson*, after noting that selection of the impartial decisionmaker should not "represent the Union's unre-

---

[8] As previously noted, in rejecting petitioners' challenge to the auditing component of the MEA Procedure, the Court of Appeals relied upon its previous decision in *Gwirtz*, App. at 3a, which involved the identical issue. A petition for certiorari was filed in *Gwirtz*, and that petition was pending when the Petition for a Writ of Certiorari was filed in the instant case. Petitioners acknowledge the relationship between the two cases, and indeed urge this Court "to grant certiorari in both and consider the cases together." Petition at 24. On April 16, 1990, however, this Court concluded that the issue presented in *Gwirtz* did not warrant further review and denied the petition for certiorari in that case. 110 S. Ct. 1810 (1990). Inasmuch as the instant Petition presents precisely the same auditing issue, the Court should likewise deny certiorari here.

stricted choice," 475 U.S. at 308 n.21, this Court referred to two treatises on labor arbitration to explain how the "selection of an arbitrator frequently does not represent one party's unrestricted choice," *id.* (citing F. Elkouri & E. Elkouri, *How Arbitration Works* 135-37 (4th ed. 1985), and O. Fairweather, *Practice and Procedure in Labor Arbitration* 79-90 (2d ed. 1981)). Both of those sources discuss and approve use of the AAA to select an impartial decisionmaker from a list of arbitrators expert in labor relations. *See, e.g.*, Fairweather at 82-85 ("[a] common method of selecting an arbitrator is an agreement to utilize the services of an impartial agency, usually either the American Arbitration Association or the Federal Mediation and Conciliation Service").

Consistent with the guidance provided by this Court in *Hudson*, the lower federal courts that have considered the issue uniformly have held that the impartial decisionmaker requirement of *Hudson* is satisfied by using the AAA, pursuant to its Rules for Impartial Determination of Union Fees, to select an arbitrator to hear challenges to the amount of the service fee. *See, e.g.*, *Ping v. NEA*, 870 F.2d 1369, 1374 (7th Cir. 1989); *Damiano v. Matish*, 830 F.2d 1363, 1371-72 (6th Cir. 1987); *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340-41 (2d Cir. 1987); *Crawford v. ALPA*, 870 F.2d 155, 160-61 (4th Cir. 1989), *vacated and rehearing en banc granted on other grounds*, No. 88-2083; *Lowary v. Lexington Local Bd. of Education*, 704 F. Supp. 1430, 1447-48 (N.D. Ohio 1987), *aff'd on reconsideration*, 704 F. Supp. 1456, 1468 (N.D. Ohio 1988), *appeal pending on other grounds*, No. 88-4191; *Gillespie v. Willard City Bd. of Education*, 700 F. Supp. 898, 904-05 (N.D. Ohio 1987); *Kidwell v. Transportation Communications Int'l Union*, 731 F. Supp. 192, 204 (D. Md. 1990).

Notwithstanding the unanimous view of the lower federal courts with regard to this issue, petitioners contend that the MEA Procedure is constitutionally inadequate

because it does not provide for "mutual selection" of the impartial decisionmaker, and because the AAA is structurally biased against nonmember employees. Neither of these conditions, however, merit further review.

To begin with, *Hudson* requires only that "the arbitrator's selection [does] not represent the Union's unrestricted choice," 475 U.S. at 308 n.21, and there is nothing in the opinion of the Court to suggest that there must be "mutual selection." Indeed, the portion of the Elkouri treatise cited by the Court expressly states that a labor dispute can be resolved by the "direct appointment of the arbitrator by [an outside] agency, [such as] the AAA." Elkouri at 136.

It would, moreover, be functionally impossible for the MEA Procedure to provide for the "mutual selection" envisioned by petitioners. Such a selection process is premised on the existence of only two parties to the arbitration who could mutually agree on the naming of an arbitrator, or who could alternatively strike names from a list of arbitrators. The MEA Procedure, in contrast, provides for the holding of one consolidated hearing for all objecting nonmember employees during each service-fee year—an aspect of the MEA Procedure that was approved by the District Court and that has not been challenged on appeal. Experience indicates that numerous employees—who are unlikely to be represented by the same counsel—will be participating in the hearing, and therefore no single representative would have the authority to select an arbitrator on behalf of all objecting nonmembers. This is precisely why the MEA Procedure relies on the AAA to appoint the impartial arbitrator.

Nor is petitioners' cause advanced by their unsupported allegation that the AAA is inherently biased against nonmember employees. Even assuming for the sake of argument that the AAA as an organization is somehow

"biased" against nonmember employees,[9] such bias would

[9] Petitioners' argument that the AAA is inherently biased against nonmember employees borders on the absurd. The AAA is a well-respected, nonprofit organization that offers its administrative services to interested parties in an effort to encourage the resolution of disputes through arbitration. As the Elkouri treatise notes, the AAA "is an administrative agency solely, never acting as arbitrator. It maintains panels from which arbitrators may be selected, and it provides administrative personnel and procedures for cases being arbitrated under its rules." Elkouri at 21.

In any event, the "evidence" submitted by petitioners in this case merely attempts to impugn the integrity of the AAA as an institution, and ultimately says nothing about the impartiality of any particular arbitrator selected by the AAA. For example, petitioners claim that the AAA's Board of Directors includes union officers and union attorneys. *See* Petition at 16. In no conceivable way, however, could union representation among the 120 members of the AAA Board of Directors be equated with the selection of biased arbitrators by the AAA. As the "evidence" submitted by petitioners demonstrates, the Board of Directors itself plays no role whatsoever in selecting arbitrators—that function is reserved to various case administrators who are employed in national headquarters or regional offices of the AAA. *See* Deposition of Robert Coulson, President of the AAA, at 19-20.

Petitioners also complain about union involvement in the development of the AAA Rules. *See* Petition at 17. But the Court in *Hudson* made clear that primary responsibility for implementing a constitutional procedure for collecting service fees falls squarely on any exclusive bargaining representative that seeks to collect such fees. Given this responsibility, the associations and other unions quite properly commented on the draft rules circulated to interested parties by the AAA, and offered concrete suggestions on how to improve those rules. At the same time, nonunion employees and their representatives, including the National Right to Work Legal Defense Foundation, also were involved in the development process. *See* Deposition of Robert Coulson, President of the AAA, at Exhibits 8-9. In the final analysis, however, the process by which the AAA Rules were drafted is essentially irrelevant: the constitutionality of the AAA Rules depends not on how those rules were developed, but on whether the method for selecting arbitrators pursuant to those rules complies with the guidelines for selecting an impartial decisionmaker under *Hudson*.

Indeed, although we are unaware of the identity of the arbitrators on the special panel of experienced labor arbitrators established

not be controlling on the question whether a particular arbitrator selected by the AAA is actually biased against nonmember employees who challenge the amount of their service fees. That question—which is ultimately dependent on the pecuniary interest or personalized animus of a particular arbitrator selected by the AAA—is dealt with sufficiently by AAA Rule 4, which provides for the disqualification of any arbitrator who actually may be biased against a party to the arbitration. And petitioners have not even attempted to show that any particular arbitrator serving as an impartial decisionmaker under the AAA Rules has been unable to function in an unbiased manner. *See generally Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986) (holding that "allegations of bias or prejudice" can serve as the basis for constitutionally required disqualification "only in the most extreme of cases"); *Horton Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 493 (1976) (noting that principles of due process are not violated merely because an adjudicator "has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances' ").

---

under the AAA Rules, the AAA has indicated that they are individuals "who seem to be particularly well accepted . . . in the labor field," and "who seem to be competent to understand these types of issues and to write an opinion that would stand up in court. In effect, its a blue ribbon panel from [the AAA's] . . . overall labor panel." *See* Deposition of Robert Coulson at 132-33. Far from being suspicious of such a panel of experts, petitioners should be pleased to know that the arbitrators chosen by the AAA will possess the expertise necessary to examine, and if necessary to challenge, the expenditures made by any union collecting service fees.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT H. CHANIN
(Counsel of Record)
BRUCE R. LERNER
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

ARTHUR PRZYBYLOWICZ
WHITE, BEEKMAN, PRZYBYLOWICZ,
SCHNEIDER & BAIRD
2214 University Park Drive
Okemos, Michigan 48805
(517) 349-7744

No. 89-1415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES E. LINDSEY, *et al.*,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONERS' REPLY BRIEF

RAYMOND J. LAJEUNESSE, JR.
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

COUNSEL OF RECORD FOR PETITIONERS

May 1990

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

I. THE UNIONS' NOTION THAT A COMPULSORY FEE CAN BE INDEPENDENTLY AUDITED WITHOUT TESTING FOR LEGAL SUPPORT IGNORES *HUDSON*'S REQUIREMENT OF CAREFUL JUSTIFICATION AND THE ACCOUNTING EVIDENCE 1

II. THE UNIONS CANNOT BY *IPSE DIXIT* ELIMINATE THE CONFLICT, IDENTIFIED BY THEIR COUNSEL, BETWEEN DECISIONS OF COURTS OF APPEALS ON THE AUDIT ISSUE 5

III. THE UNIONS MISCHARACTERIZE THE NATURE OF ARBITRATION AND THE RECORD, AND IGNORE READILY AVAILABLE, FAIRER ALTERNATIVES TO THE AAA'S SCHEME FOR SELECTING AN IMPARTIAL DECISIONMAKER 7

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Andrews v. Cheshire Education Association,
829 F.2d 335 (2d Cir. 1987) 6

Antry v. Illinois Educational Labor Relations Board, 552 N.E. 2d 313
(Ill. Ct. App. Mar. 15, 1990)
(WESTLAW, Ill. Cas.) 6

Beck v. Communications Workers, [1980] Daily Lab. Rep. (BNA) No. 166, at D-1
(D. Md. Aug. 18, 1980) (Master's Report) 4

Bethlehem Mines Corp. v. Mine Workers,
344 F. Supp. 1161 (W.D. Pa. 1972), *aff'd*,
494 F.2d 726 (3d Cir. 1974) 7

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 8-9

Communications Workers v. Beck,
487 U.S. 735 (1988) 3

Damiano v. Matish, 830 F.2d 1363
(6th Cir. 1987) 2-3

Ellis v. Railway Clerks,
466 U.S. 435 (1984) 1, 4-5, 10

Gwirtz v. Ohio Education Association,
887 F.2d 678 (6th Cir. 1989), *cert. denied*,
110 S. Ct. 278 (1990) 6

TABLE OF AUTHORITIES - CONTINUED

Page

Hohe v. Casey, 727 F. Supp. 163 (M.D. Pa. 1989) 2, 6

McKinley v. Martin, 722 F. Supp. 697 (D. Wyo. 1989) 7

In re Murchison, 349 U.S. 133 (1955) 8

Railway Clerks v. Allen, 373 U.S. 113 (1963) 3

Rankin v. McPherson, 483 U.S. 378 (1987) 6

Rogers v. Schering Corp., 165 F. Supp. 295 (D.N.J. 1958), *aff'd per curiam*, 271 F.2d 266 (3d Cir. 1959) 9-10

Teachers Local 1 v. Hudson, 475 U.S. 292 (1986) . . . . . *passim*

Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987) 2, 6

Constitutional Provisions

U.S. Const. amend. I 1, 3, 6

TABLE OF AUTHORITIES - CONTINUED

Page

Other Authorities

F. Elkouri & E. Elkouri, *How Arbitration Works* (4th ed. 1985) 8

O. Fairweather, *Practice and Procedure in Labor Arbitration* (2d ed. 1983) 7

D. Hawkins, *Corporate Financial Reporting: Text and Cases* (rev. ed. 1977) 4

Montgomery's Auditing (10th ed. 1985) 3

I. THE UNIONS' NOTION THAT A COMPULSORY FEE CAN BE INDEPENDENTLY AUDITED WITHOUT TESTING FOR LEGAL SUPPORT IGNORES *HUDSON*'S REQUIREMENT OF CAREFUL JUSTIFICATION AND THE ACCOUNTING EVIDENCE

Unions must meet procedural requirements to collect compulsory service fees, but not because there is a "potential for infringing on the First Amendment rights of nonmember employees," as Respondents' Brief in Opposition ("Opposition") at 8 suggests. Rather, "the agency shop *itself is* a 'significant impingement on First Amendment rights,'" and that fact "requires that the procedure be carefully tailored to *minimize* the infringement" that already exists. *Teachers Local 1 v. Hudson*, 475 U.S. 292, 303, 307 n.20 (1986) (emphasis added) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)).

Respondent unions' misstatement of the effect on first-amendment rights here is understandable. To state it correctly would require them to address the primary reason for granting certiorari: the conflict with *Hudson* and *Ellis*, 466 U.S. at 443-44, created by the failure of the court of appeals to hold the unions' procedures unconstitutional, because there are readily available alternative means, which would better protect the first-amendment rights of nonmembers, of (1) independently verifying the calculation of the fee before it is collected and (2) selecting an impartial decisionmaker to hear nonmembers' challenges to that calculation. *See* Petition at 8-20.

Instead of trying to reconcile the ruling below as to verification with the less-restrictive-alternative test applied in *Hudson* and *Ellis*, the unions argue that "there is nothing in footnote 18" of *Hudson* to suggest that an independent auditor must "verify the union's breakdown between legally chargeable and legally nonchargeable expenditures." Opposition at 12. However, the holding of *Hudson*, 475 U.S. at 306-07 & n.18, that adequate dis-

closure of "the basis for the proportionate share" charged nonmembers "surely would include * * * verification by an independent auditor," does not stand alone.

Footnote 18 is part of *Hudson*'s ruling that the disclosure must "identif[y] the expenditures for collective bargaining and contract administration." *Id.* at 306-07. Thus, even if only the footnote's immediate context is considered, it is the identification of expenses as chargeable or not which must be independently verified, not "the actual amount of expenditures in each of the union's 'major categories of expenses,' " Opposition at 12, in its basic financial statements. *Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989).

Moreover, *Hudson*, 475 U.S. at 309 (emphasis added), characterizes the goal of disclosure—and thus the audit—as "to provide adequate *justification* for the advance reduction of dues." If the reduction is to be "appropriately justified," *id.*, "an independent audit" must verify the portion of dues that would "unquestionably" be spent for nonchargeable purposes. *Tierney v. City of Toledo*, 824 F.2d 1497, 1503-04 (6th Cir. 1987); *see Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987).[1] *Hudson*, 475 U.S. at 310 (emphasis added), also describes the independent verification as "a *certified public accountant's* [*not* the union's] verified *breakdown* of expenditures."

To support the argument that the categories of expenses which the auditor must verify are different information from the identification of chargeable and nonchargeable expenses, the unions take out of context a series of comments in *Hudson*. *See* Opposition at 10, 12. The Court may have intended a "limited notice require-

---

[1] The *Hudson* audit thus serves two purposes: to give nonmembers sufficient information to decide whether to object to the amount of the fee *and* reduce the risk that the fee collected from objectors might include costs that are not constitutionally chargeable to them.

ment" which would "not impose an undue burden on the union," but it *also* held that the information must be "sufficient to satisfy the First Amendment concerns in this context." *Id.* at 306 n.17. The union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," because *the independent auditor* will have reviewed the individual expenses in verifying the union's calculation of the chargeable portion of its total annual expenditures. *Id.* at 307 n.18. And, that " '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required,' " *id.* (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)), does not mean that little precision is necessary. As the district court held in this case, only "a limited amount of imprecision is tolerable in calculating a service fee." App. D at 88a; *see Damiano*, 830 F.2d at 1369.

While not as part of a less-restrictive-alternative analysis, the unions argue that auditors cannot "verify the union's breakdown between legally chargeable and legally nonchargeable expenditures," because that "would require a *financial* expert * * * to make a *legal* judgment." Opposition at 12-13. Their argument quotes from accounting texts to the general effect that the " 'expertise of most auditors is limited to laws and regulations that are financial in nature, . . . [and] [a]uditors generally do not have the background and training to evaluate the degree to which an enterprise conforms to * * * other laws and regulations * * * .' " *Id.* at 13 n.6 (quoting, *e.g.*, *Montgomery's Auditing* 22-23 (10th ed. 1985)).

The unions confuse the auditor's role with that of the impartial decisionmaker. The auditor can and should evaluate whether the unions can cite definitive legal authority which clearly supports their allocation of an expense category as chargeable, or only undefinitive or ambiguous authority, in which event the expenses should be disclosed to nonmembers as disputable. That is a

factual, not legal, question.[2] On the other hand, whether disputable expenses are chargeable as a matter of law is a legal question for the impartial decisionmaker.

The only evidence on this issue, which the unions ignore, is the professional opinions of two accounting experts that the legal criteria for a service fee are of the kind that auditors can evaluate. Irving B. Ross, a certified public accountant who was qualified as an expert in both *Communications Workers v. Beck*, 487 U.S. 735 (1988),[3] and *Ellis*, stated "that an independent Certified Public Accountant would normally have the necessary background, training and experience" to "use his judgment independently to determine whether the union is in compliance with established legal criteria and is using acceptable standards and methods in performing its calculation." R.260: Ross Affidavit at 3, 7-8 (JA 237, 241-42).

Similarly, David F. Hawkins, a Professor at Harvard University Graduate School of Business Administration,[4] concluded that "there is no doubt that certified public

---

[2] For example, an auditor can easily make the *factual* judgment that organizing expenses should not be allocated as clearly chargeable in the disclosure, because *Ellis*, 466 U.S. at 451-53, and the district court here, App. B at 41a-42a, said that they are not chargeable.

[3] The Special Master before whom *Beck* was tried found Ross "to be not only unusually well qualified as a Certified Public Accountant in the particular area of accounting involved in the present case, but also to be objective, truthful and accurate." *Beck v. Communications Workers*, [1980] Daily Lab. Rep. (BNA) No. 166, at D-1, D-5 (D. Md. Aug. 18, 1980) (Master's Report).

[4] Professor Hawkins has taught financial reporting and analysis for 26 years and served on the Financial Accounting Standards Advisory Council and task forces of the Financial Accounting Standards Board. He has received professional awards and honors and written and contributed to many books and publications on financial reporting and analysis of financial reports, including *Corporate Financial Reporting: Text and Cases* (rev. ed. 1977), a leading textbook in the field. R.260: Hawkins Affidavit at 1 & *vita* (JA 266, 288-300).

accountants, without violating their professional standards, can and do make accounting judgments as to what is and what is not a chargeable cost." R.260: Hawkins Affidavit at 5 (JA 270). He explained:

> Unlike many other legal concepts and legal definitions, the issue of the determination, reporting, and auditing of chargeable costs has been clothed in part in accounting concepts by the courts. Since legal considerations have a direct effect on the amounts presented as chargeable costs, * * * the facts of the situation and the standards of the profession demand that an auditor performing a service fee attestation service acquire adequate knowledge of the relevant legal considerations, use this knowledge in the planning and performance of his or her engagement, and, after consulting with appropriate counsel, be prepared to issue a qualified opinion if, in his or her professional judgment, a union fails to adhere to the service fee accounting standards and cost definitions set by the courts.

Id. at 20 (JA 285). Professor Hawkins also said that "[c]ertifed public accountants are particularly well-suited by training and experience to audit a union's determinations of chargeability." *Id.* at 21 (JA 286).

Thus, because a more carefully tailored independent verification of the calculation of the service fee is readily obtainable, the court of appeals' approval of lesser accounting services conflicts with *Hudson* and *Ellis*.

II. THE UNIONS CANNOT BY *IPSE DIXIT* ELIMINATE THE CONFLICT, IDENTIFIED BY THEIR COUNSEL, BETWEEN DECISIONS OF COURTS OF APPEALS ON THE AUDIT ISSUE

The Petition at 21-22 pointed out that in 1987 the unions' counsel of record identified a conflict, worthy of this Court's review, between the Sixth Circuit's decision in

Tierney and *Andrews v. Cheshire Education Ass'n*, 829 F.2d 335 (2d Cir. 1987), as to the nature of the audit required by *Hudson*. *See* App. J at 122a-23a. The Opposition is deafeningly silent as to that damaging admission. It also neither explains how *Hohe*, 727 F. Supp. at 167, could cite *Tierney* and *Andrews* as contrary, if they do not conflict, nor mentions that *Antry v. Illinois Educational Labor Relations Board*, 552 N.E.2d 313, 325-26 (Ill. Ct. App. Mar. 15, 1990) (WESTLAW, Ill. Cas.), cited in the Opposition at 14, discusses them as conflicting decisions.

Instead, the unions rely on the fact that in this case and *Gwirtz v. Ohio Education Ass'n*, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 278 (1990),[5] which followed *Andrews*, panels of the Sixth Circuit treated *Tierney* as consistent on the verification issue. *See* Opposition at 15-16. However, neither the later panels nor the unions can reconcile conflicting decisions after the fact simply by saying that there is no conflict. Any fair comparison of *Tierney*, 824 F.2d at 1503-06, with *Andrews*, 829 F.2d at 339-40, must acknowledge that the two decisions conflict, as the unions' counsel originally conceded.

---

[5] The Opposition at 17 n.8 asserts that "the instant Petition presents precisely the same auditing issue" as *Gwirtz*. It does not, because the procedure here on its face does not prescribe even the *Gwirtz*-type accounting. *See* Petition at 10-11. The unions argue that petitioners seek to relitigate factual findings that their procedure requires verification as defined in *Gwirtz*. *See* Opposition at 10-11. However, what the unions describe as factual findings are only *assumptions* of the lower courts, unsupported by record evidence (significantly, the unions cite none), that the verification would necessarily be more than what the procedure says on its face. On first-amendment issues, this Court cannot defer to findings, much less assumptions, of lower courts, but must examine the entire record anew. *Rankin v. McPherson*, 483 U.S. 378, 384-86 & n.9 (1987).

III. THE UNIONS MISCHARACTERIZE THE NATURE OF ARBITRATION AND THE RECORD, AND IGNORE READILY AVAILABLE, FAIRER ALTERNATIVES TO THE AAA'S SCHEME FOR SELECTING AN IMPARTIAL DECISIONMAKER

The unions say that *Hudson* "held * * * that 'expeditious arbitration' would be sufficient" to provide nonmembers an opportunity to challenge the service fee before an impartial decisionmaker. Opposition at 17 (quoting *Hudson*, 475 U.S. at 308 n.21). In fact, *Hudson*, 475 U.S. at 308 n.21 (emphasis added), did not *hold* that arbitration would be sufficient, but only said in *dicta* "that an expeditious arbitration *might* satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker."

Moreover, a scheme like that here, where one party to a dispute *unilaterally* selects a third party which chooses the decisionmaker, is *not* arbitration. "By definition, an arbitrator must be a person chosen by mutual agreement." The "essential element of arbitration" is "that the selection of the particular arbitrator or the method of selection of an arbitrator be established by mutual agreement between the parties." *Bethlehem Mines Corp. v. Mine Workers*, 344 F. Supp. 1161, 1165 (W.D. Pa. 1972), *aff'd*, 494 F.2d 726 (3d Cir. 1974). Because a "party's right to choose an arbitrator is * * * an important one," *McKinley v. Martin*, 722 F. Supp. 697, 703 (D. Wyo. 1989), it "is fundamental that one cannot be compelled to submit a matter to arbitration before a particular individual where there is no agreement as to the method by which that individual is chosen." *Bethlehem Mines*, 344 F. Supp. at 1165.[6]

---

[6] The texts cited in *Hudson*, 475 U.S. at 308 n.21, do not approve of *unilateral* selection of the American Arbitration Association ("AAA") to name arbitrators. They only say that a "common method of selecting an arbitrator is *an agreement* to utilize the services of" an outside agency such as the AAA. -O. Fairweather, *Practice and*

In arguing that the evidence as to the AAA's selection scheme "says nothing about the impartiality of any particular arbitrator selected by the AAA," the Opposition at 20 n.9 is disingenuous. It is immaterial that AAA's "Board of Directors itself plays no role whatsoever in selecting arbitrators," *id.* The point is that an unacceptable "probability of unfairness," *In re Murchison*, 349 U.S. 133, 136 (1955), is shown by the evidence of the union representation on the Board that governs the AAA, the bias of the staff who selected the special pool from which arbitrators are chosen for union fee disputes, R.260: Deposition of Robert Coulson at 133, 136-37 (JA 366, 369-70), and, most importantly, the AAA's criteria that members of that pool must have been *recommended and regularly employed by unions* in labor-management disputes, *see id.* at 132, 150-51 (JA 365, 377-78).[7]

Equally fundamental is the fact, ignored by the unions, that unlike the AAA's general rules, its special rules for service-fee disputes neither require it to disclose circumstances that create an appearance of bias *to nonmembers* nor permit them peremptorily to disqualify a decision-maker, but leave disqualification to the *discretion of the AAA*. *Compare* App. I, 121a, *with Commonwealth Coatings*

Procedure in Labor Arbitration 82 (2d ed. 1983) (emphasis added); *accord* F. Elkouri & E. Elkouri, *How Arbitration Works* 136 (4th ed. 1985) (an "agreement may designate * * * the AAA" to make a "direct appointment"). Elkouri, at 135, also says, "[n]o part of the arbitration process is more important than that of selecting the person who is to render the decision," and "selection by mutual agreement of the parties is the most desirable method."

[7] Also, while admitting that union attorneys had a "concrete" part in developing the AAA's rules, the Opposition at 20 n.9 misleadingly says that "nonunion employees and their representatives * * * also were involved." In fact, the only role permitted nonmembers and their representatives was letters, ignored by the AAA, criticizing the first draft of the rules, while the AAA's President met twice with union attorneys about the rules. *See* R.260: Coulson Deposition at 115-34, Exs. 5, 8-9 (JA 348-67, 393-404).

Corp. v. Continental Casualty Co., 393 U.S. 145, 149 (1968). Such an arrangement was held to violate due process in *Rogers v. Schering Corp.*, 165 F. Supp. 295 (D.N.J. 1958), *aff'd per curiam*, 271 F.2d 266 (3d Cir. 1959) (affirmed on the district court's "succinct and careful opinion"), a case cited by *Commonwealth Coatings*, 393 U.S. at 148 (equating constitutional and arbitration due process).

In *Rogers*, a prospective replacement arbitrator informed the AAA that he had done business with one party to a dispute. Interpreting its rules as not requiring disclosure to the parties of circumstances bearing on whether there is a presumption of bias when it fills a vacancy, and concluding that the facts did not require disqualification, the AAA permitted the arbitration to proceed without disclosing the replacement's prior employment to the other party. The court vacated the award as "evidently partial" for reasons that apply here:

> [Wh]en the Association is informed by a prospective arbitrator * * * of circumstances which are "likely to create a presumption of bias," *nothing less than a prompt communication of such disclosure to the parties * * * provides the affected party with an opportunity to challenge "for cause."* Nor is it sufficient for the Association to take the position that it weighed the disclosure and concluded that it did not affect the eligibility of the proposed arbitrator. * * * The party may well have a sensitivity to the disclosure not realized by the appointing authority, and * * * it should not be deprived of at least the opportunity to convince the appointing authority of the desirability of selecting a replacement * * * .

165 F. Supp. at 300 (emphasis altered). The court explained that the failure of the AAA to communicate the disclosure to all parties was "more than a loose procedural informality. *It goes to the heart of a body designed to resolve controversy—its integrity. In this instance, it fails to*

protect what might be termed 'due arbitration process.' " *Id.* at 301 (emphasis added).

Given the defects of the AAA's scheme, the unions' procedures are unconstitutional under *Hudson* and *Ellis* unless there are no readily available and fairer alternative means of selecting an impartial decisionmaker. The Petition at 15 suggested two, "mutual selection by the union and nonmembers or representatives of their interests, *e.g.*, the National Right to Work Legal Defense Foundation," and "appointment by a government agency, *e.g.*, the Federal Mediation and Conciliation Service or a state labor agency."

The unions argue that mutual selection is "functionally impossible," because "no single representative would have the authority to select an arbitrator on behalf of all objecting nonmembers." Opposition at 19. However, if the unions can unilaterally designate the AAA to name a decisionmaker, they can designate a representative of nonmembers to participate in mutual selection. The unions do not even try to argue that appointment could not be by a government agency. Thus, because there are at least two readily available, fairer alternatives to direct appointment by the AAA, the decision below upholding that scheme conflicts with *Hudson* and *Ellis*.

IV. CONCLUSION

The petition should be granted as to both questions.

Respectfully submitted,

RAYMOND J. LaJEUNESSE, JR.
Counsel of Record for Petitioners